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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM ANDREWS,

Petitioner,

- v. -

KENNETH V. SHULSEN, Warden, Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Petitioner, a black nineteen-year-old, was sentenced to death for his role as an accomplice to an interracial murder. Both the state and federal courts refused to hold an evidentiary hearing on the claim he was denied his rights under the Eighth and Fourteenth Amendments, as a result of the exclusion of blacks from the jury, the jury's exposure to prejudicial media coverage and to manifestations of anti-black community sentiment (including a note saying "Hang the Niggers"), and the demonstrated inadequacy of the Utah statutory scheme to prevent discrimination against black defendants in capital sentencing.

Can a hearing be denied on such evidence that racial bias and community prejudice influenced a sentence of death?

2. The Utah Supreme Court found, on Petitioner's appeal, that he did not kill the victims of this crime and was not present when they were killed, but that he "significantly aided in triggering a milieu that ended in catastrophe and death ... knowing ... that it would most probably conclude as it did."

Does Tison v. Arizona, 107 S.Ct. 1276 (1987) require a remand to state court for a determination of petitioner's personal culpability under the appropriate constitutional standard?

3. The Utah statutory system under which Petitioner was sentenced to death has several unique features:

(1) It does not require consideration of any statutory aggravating circumstances, other than the elements of first degree murder, at the capital sentencing hearing;*

(2) It permits the death penalty to be imposed on general verdicts of "guilty" of first degree murder and "death" as punishment, without any written findings of aggravating circumstances or factors at any stage;

(3) It did not provide for any automatic judicial or appellate review of a death sentence imposed by a jury.

Does such a system comport with the Eighth Amendment, after Furman v. Georgia, 408 U.S. 238 (1972)?

4. The jury in Petitioner's case was given sentencing instructions which the Utah Supreme Court later held invalid, because they improperly permit "the death penalty [to] ... be imposed where there is substantial doubt whether it should be."

Does the Eighth Amendment permit a death sentence to be imposed despite such doubts?

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*In Lowenfield v. Phelps, No. 86-6867 certiorari has been granted to examine a death sentencing procedure which shares this feature.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner William Andrews respectfully prays that a writ of certiorari issue to review the judgment of the Tenth Circuit Court of Appeals in this case.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), rehearing denied, __ F.2d __ (10th Cir. 1987), and is attached as Appendix A. The opinion of the United States District Court for the District of Utah is reported as Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984).

JURISDICTION

The decision of the Tenth Circuit Court of Appeals was rendered on October 6, 1986. A timely petition for rehearing was denied on June 8, 1987. See Appendix A-21.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to ... trial ... by an impartial jury ..."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It also involves the 1973 Utah capital sentencing statute, which is reproduced in full in Appendix B.

STATEMENT OF THE CASE

Petitioner William Andrews was convicted and sentenced to death on three counts of first-degree murder for his participation as a non-triggerman in killings committed during an armed robbery. The convictions and sentences of death were upheld by the Utah Supreme Court in State v. Andrews, 574 P.2d 709, 711 (Utah 1977), cert. denied, 439 U.S. 882 (1978). A petition for state post-conviction relief was denied, and that denial was affirmed in Andrews v. Morris, 607 P.2d 816 (Utah 1980), cert. denied, 449 U.S. 891 (1980). Petitioner thereafter filed the present habeas corpus proceeding in the United States District Court for the District of Utah, which denied relief without an evidentiary hearing in Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984). The Tenth Circuit affirmed in Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), rehearing denied, ___ F.2d ___ (10th Cir. 1987).

The facts of the case were summarized by the Utah Supreme Court in the following manner:

> [Co-defendant Dale Pierre], Andrews and [co-defendant Keith] Roberts were airmen stationed at Hill Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by [Pierre] in company with Andrews, who aided [Pierre] by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. [Pierre] and Andrews both had hand guns and [Pierre] finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by [Pierre] just before he shot her) and Carol Naisbitt ... [A]fter shooting [Orren Walker, Pierre] vehemently kicked a ball point pen into one of his ears and attempted to strangle him with a cord.

State v. Pierre, 572 P.2d 1338, 1343-44 (Utah 1977), cert. denied, 439 U.S. 882 (1978).

Orren Walker, who testified at trial, described petitioner as leaving the scene prior to the time when Pierre committed the rape and the killings. As the Utah Supreme Court related in summarizing this aspect of Mr. Walker's testimony:

> Walker ... revealed that [petitioner] ... asked Pierre in the basement of the Hi-Fi Shop, after Pierre had discharged his handgun (not at that time shooting anyone), "What did you do that for, man"; that [petitioner] was nervous and upset; that when Walker made no movement after being told by Pierre to administer the Drano to Michelle Ansley, Stanley Walker, and Cortney Naisbitt, [petitioner] said to Walker, "Man, there is a gun at your head"; that either before or after the administration of the Drano to the victims [petitioner] said: "I can't do it, I'm scared", though Walker stated that he did not know to what this remark of [petitioner's] referred; and that [petitioner], who left and returned to the basement on more than one occasion during the evening of April 22nd, was not observed firing any gun nor was he present when Michelle was raped and all the victims were shot.

State v. Andrews, supra, 574 P.2d at 709-10.

The evidence presented in the sentencing hearing was summarized as follows by the Utah Supreme Court:

> [Petitioner] was at the time of trial 20 years of age, was abandoned at birth by his father, left home when he was 10, committed a burglary at 15, went to the Job Corps thereafter, and committed auto theft while in the Job Corps (for which he was placed on probation). While in the United States Air Force, [he] failed to appear for a dental appointment, failed to report for duty, without authorization left a place of duty, and had a separation action from the Air Force commenced against him on the basis he was "minimal productive, and a limited potential airman".

State v. Andrews, supra, 574 P.2d at 710.

Additional pertinent facts will be presented as they relate to petitioner's various claims.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE RIGHT OF A PRISONER UNDER A SENTENCE OF DEATH TO PRESENT EVIDENCE SPECIFIC TO HIS OWN CASE, INDICATING THAT RACIAL CONSIDERATIONS AND COMMUNITY PREJUDICES INFLUENCED HIS SENTENCE OF DEATH.

Petitioner sought an evidentiary hearing in the District Court for the purpose of showing that the jury that condemned him to die was prejudiced by a number of factors, including the exclusion of blacks from the jury and the exposure of jurors to manifestations of anti-Black community sentiment (most significantly, a note saying "Hang the Niggers") and prejudicial media coverage prior to and during the trial (including articles that falsely described petitioner raising his fist in an apparent "Black Power" gesture, directed at one of the victims, after the verdict). See R. 1112-15, 1376. Petitioner also offered to prove that death sentences in Utah had been imposed, to a vastly disproportionate extent, on black defendants as opposed to white. Ibid.

The District Court first granted, then denied, this request for a hearing. Following initial briefing and argument, in which petitioner pointed out that no evidentiary hearing had ever been held in state court on these issues, the District Court granted an evidentiary hearing on some of them, allowing petitioner "to show specific jurors were improperly exposed to specific improper influences to the extent that it may be done without discovery directed at the jurors themselves." R. 540. However, shortly before the evidentiary hearing was scheduled to begin, the Utah Supreme Court issued a decision in State v. Wood, 648 P.2d 71 (Utah 1981) which dramatically altered the state's death sentencing standard. See Part IV, below. The District Court responded by first postponing the evidentiary hearing, R. 1028, and then directing petitioner's counsel to make an "appropriate application to the State Supreme Court based on State v. Wood." R. 1086-87. After petitioner did so, without success, see Andrews v. Morris, 677 P.2d 81 (Utah 1983), petitioner filed a Second Amended Petition in the District Court. R. 1092. However, the District Court then reversed its earlier decision to conduct an evidentiary hearing and summarily dismissed the petition on the merits. Andrews v. Shulsen, supra, 600 F.Supp. at 415-16, 426, 432. Its denial of an evidentiary hearing and dismissal of the petition were affirmed by the Tenth Circuit. Andrews v. Shulsen, supra, 802 F.2d at 1260, 1266, 1270, 1275.

Those decisions present a set of important issues regarding "the special seriousness with which [this Court has] view[ed] the risk of racial prejudice influencing a capital sentencing decision," Turner v. Murray, 106 S.Ct. 1683, 1688 n.8 (1986), and the need to insulate the death sentencing process from influences which can "inflame the jury and divert it from deciding a case on the relevant evidence concerning the crime and the defendant." Booth v. Maryland, 55 U.S.L.W. 4836, 4839 (U.S., June 16, 1987).

A. Important Issues Are Presented By The Summary Dismissal Of Petitioner's Claims That His Death Sentence Reflected Race-Prejudicing Influences And Inadequate Systemic Protections Against Racial Discrimination.

McCleskey v. Kemp, 107 S.Ct. 1756 (1987), rejected the argument that "a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that ... [a] capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." Id. at 1761. The Court emphasized that McCleskey had "offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." Id. at 1766-67. He "relie[d] solely on the Baldus study," id. at 1767, and the Court held that study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose," id. at 1769. The teaching of McCleskey is that in order "to prevail under the Equal Protection Clause, [a capital defendant] ... must prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 1766. Petitioner was not allowed to do that.

(1) Petitioner Alleged Case-Specific Facts Showing That Race-Prejudicing Factors Affected The Selection Of The Jury And The Outlook Of The Jurors.

In the present case, petitioner sought an evidentiary hearing for the purpose of making precisely the type of showing demanded in McCleskey: a presentation of "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." Id. at 1766-67. Petitioner sought to show that race-prejudicing factors affected every stage of his trial, from jury selection to sentencing.

a. The Selection of a Racially Biased Jury.

This was a case in which all three defendants were black and strangers to the area, while all of the victims were white and members of the local community. The petition alleged, and offered to show in an evidentiary hearing, that "[t]he race of the defendants and victims was prominently mentioned in the local press and among the citizens of Davis and Weber County" [respectively, the county to which venue was transferred on the State's motion, and the county where the charges originated]. R. 1114.[1]

The petition also alleged and sought an evidentiary hearing to show that non-white jurors were excluded from the trial of this case by a jury selection system that barred the majority of non-white citizens of Davis and Weber counties,[2] and that the only black person called to sit on the jury was excused by the prosecutor, who employed a peremptory challenge to ensure that the jury would be all white. R. 1114.

Petitioner would have shown not only that the jury was exclusively caucasian, but that it was affected by religious convictions that were prejudicial to black persons. The petition alleged most of the jurors were members of the Church of Jesus Christ of the Latter Day Saints (the Mormon Church), and "[u]nder the doctrines of that church at the time of the defendant's trial, black people were not considered to be equal to white

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[1] A pretrial survey conducted by an expert retained by petitioner's co-defendant showed that the two facts about the case which were most widely known were that the defendants were not from the local community (86.6% of the respondents knew this) and that both defendants charged in the case were black (80.6% of the respondents knew this). See Sentiments Relating to the Hi-Fi Shop Case, St. R. 158 at 10.

[2] At the time of petitioner's trial, Utah jurors had to be taxpayers, selected from the "legal voters on the assessment rolls of the county." Former § 78-16-17, U.C.A. 1953. The vast majority of black residents of Davis County were not property owners "on the assessment rolls," partly because they were servicemen stationed at Hill Air Force Base.

people." R. 1113.[3] As this Court observed in Turner v. Murray, 106 S.Ct. 1683 (1986), "subtle, less consciously held racial attitudes could ... influence a juror's decision," and "a juror who believes that blacks are ... morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved ... aggravating factors." Id. at 1687.

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[3] Until June, 1978 it was the official doctrine of the Mormon Church that blacks were excluded from its lay priesthood, which included virtually all other male members of the Church. See BRINGHURST, SAINTS, SLAVES, AND BLACKS (1981).

This doctrine was announced by Brigham Young--a Prophet of the Church and the first Governor of Utah--who taught that black skin was the mark of the curse visited on the biblical Cain, for killing Abel:

> I tell you, this people that are commonly called negroes are the children of the old Cain. I know they are, I know that they cannot bear rule in the preisthood [sic] for the curse upon them ....

Id. at 123, quoting Young's "Speech to the Joint Session of the Legislative Assembly," 5 January 1852; see also id. at 97, 99.

Later Mormon Church Presidents maintained this position unchanged for over 125 years. In 1907 the First Presidency of the Church adopted the position that "'[N]o one known to have in his veins Negro blood (it matters not how remote a degree)' could receive 'the blessings of the Temple of God.'" Id. at 148, quoting Richards, Record of Decisions by the Council of the First Presidency and the Twelve Apostles, no. 3 (1907). In 1949 the Church leadership reiterated this position, justifying it by reference to "the conduct of spirits in the premortal existence" and quoting Brigham Young as follows:

> Why are so many of the inhabitants of the earth cursed with a skin of blackness? It comes in consequence of their fathers rejecting the power of the holy priesthood, and the law of God. They will go down to death.

LDS First Presidency Statement of August 17, 1949.

In 1969, the Church defended this practice, ascribing it to "reasons we believe are known to God, but which He has not made fully known to man." LDS Church First Presidency Statement of December 15, 1969. This Statement quoted then-Church President David O. MacKay thus:

> "The seeming discrimination by the Church toward the Negro is not something which originated with man; but goes back to the beginning with God .... Revelation assures us that this plan antedates man's mortal existence extending back to man's pre-existent state."

Ibid. A poll commissioned by the Utah Law Enforcement Planning Agency in October, 1971, found that 70 percent of Utah Mormons supported the denial of the priesthood to blacks, and one third ascribed controversy about it to a "black conspiracy" to destroy the Church. New York Times, April 6, 1972, p. 20.

It was only in June, 1978--four years after petitioner's trial--that the Church announced a new "revelation ... confirmed that the long-promised day has come," and "all worthy male members of the church may be ordained to the priesthood without regard to race or color." LDS Church First Presidency Statement of June 8, 1978.

b. The Race-Prejudicing Influences During Trial.

Additionally, petitioner would have shown in an evidentiary hearing that the implicit racial biases of the jurors were exacerbated by incidents manifesting the racial sentiments of the community. Cardinal among these was the exposure of some or all of the jurors to a note saying "Hang the Niggers."

The record reflects only the most general facts regarding this incident. At lunch-time each day, the jurors were bused from the courthouse to a cafe, where the jurors ate together in a separate dining room. St. T. 2447. During one lunch period, a juror presented the bailiff with a napkin containing a stick figure hanging on a gallows, bearing the inscription "Hang the Niggers." St. T. 2449. The bailiff reported the incident to the trial judge, who, in turn, had counsel informed. St. T. 2451. The bailiff was sworn and questioned, but could provide little information about the source and distribution of the napkin, or its effect upon the jurors. He said "it is possible" one of the jurors drew the figure, "that much time could have elapsed" after the jurors entered the dining room. St. T. 2454. He testified that the jurors sitting adjacent to the juror who turned in the napkin must have seen the drawing, but he "couldn't say with any degree of certainty" how many others did. St. T. 2450. And aside from reporting that "some of the jurors" asked him "what the court may do about this," the bailiff was unable to report any "comments one way or the other about it" among the remaining jurors. St. T. 2450.

Petitioner's counsel moved for a mistrial, and alternatively for sequestration of the jury, as a result of this event. St. T. 2451. The court denied both motions after hearing the bailiff's testimony, without calling any of the jurors to the courtroom for questioning or a specific cautionary instruction. St. T. 2455. The court's only action was to give a general instruction to the

entire panel in vague language that did not specifically refer to the napkin incident.[4]

c. The Prejudicial Publicity Between Guilt and Sentencing.

At the conclusion of the guilt phase of the trial, the judge released the jurors into the community for five days until the commencement of the sentencing hearing, saying: "Sleep well. Your verdict is reasonable." St. T. 4114. During this five-day period, there was prejudicial media coverage of the case, including a false story that petitioner had directed a closed fist gesture at one of the surviving victims, after the verdict. St. T. 4120. As this Court has recognized, "[f]ear of blacks, which could easily be stirred up by ... violent facts of [a] ... crime, might incline a juror to favor the death penalty." Turner v. Murray, supra, 106 S.Ct. at 1687. Such fears and latent religious beliefs of black inferiority might well be "stirred up" even more by reports of black militancy and apparent "Black Power" salutes. However, again, when this false and prejudicial story was brought to the trial court's attention, no questions were put to the jurors and no special admonitions were given; the defendants' motion for a mistrial was simply summarily denied. St. T. 4121.

(2) Petitioner Proffered Facts Showing That The Utah Statutory Scheme Fails To Adequately Guard Against The Effects Of Case-Specific Race-Prejudicing Influences On The Jury.

In McCleskey, the statistics on racial patterns in capital sentencing were proffered as a basis, in and of itself, for finding discriminatory purpose on the part of the decisionmaker. In the present case, statistics on racial patterns in Utah

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[4]This was the trial court's entire admonition to the jury on this subject: "Occasionally some foolish person will try to communicate with you. Please disregard the communications from foolish persons and ignore the same. You understand what happened. Just ignore communications from foolish people." St. T. 2456-7.

capital sentencing are relevant to a different issue--an issue that was not raised, and therefore not ruled upon, in McCleskey: whether the Utah capital sentencing system contains adequate safeguards to prevent case-specific race-prejudicing factors, such as the ones in the present case, from tainting the jury and its verdict.[5]

In an evidentiary hearing, petitioner would have presented statistics showing that black capital defendants in Utah, and particularly black defendants who are charged with killing white victims, face a disproportionately high risk of conviction of murder and imposition of a death sentence. See R. 1112-3; Affidavit, Appendix E at 9-23. The evidence petitioner proffered was not as detailed as that submitted in McCleskey,[6] but the pattern it revealed was similar, with one significant exception: the disparities in Utah death sentencing primarily involve the race of the defendant, not just the victim. Petitioner would have shown that there is a statistically significant disparity based on the defendant's race in all Utah cases, with a gross death sentencing rate for blacks who kill whites 25 times as great as the death sentencing rate in white defendant cases. App. E at 9. His evidence showed that the pattern persists even after controlling for variables that might have affected the

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[5] The habeas corpus petition and motion for an evidentiary hearing, which were filed prior to this Court's decision in McCleskey, framed the allegations and proffers in the terms that were subsequently rejected in McCleskey. However, the facts alleged and the statistics offered bear no less pertinently upon the issue whether the Utah capital sentencing system possesses adequate safeguards against racial discrimination.

[6] Petitioner's counsel compiled data concerning Utah's capital sentencing patterns from: responses to questionnaires sent by the Utah Attorney General to local prosecutors, as part of the discovery process prepatory to the evidentiary hearing initially ordered by the District Court; information on homicides maintained by the Utah Department of Vital Statistics; F.B.I. Uniform Crime Reports Supplemental Homicide Reports; published case reports; and interviews of prosecutors and defense attorneys who litigated capital cases. App. E, 4-7.

sentencing in the present case.[7] Although the number of cases in the state of Utah was relatively small, most of these figures were statistically significant because the sentencing disparities based on the defendant's race were so large--indeed, petitioner offered to prove, greater than those in any other state.

This statistical and comparative evidence, while not sufficient by itself to show racial motivation in any specific case after McCleskey, would have persuasively demonstrated that the Utah capital sentencing scheme fails to guard effectively against case-specific race-prejudicing factors such as those that were prevalent in the present case.

(3) The Lower Courts Erred In Summarily Dismissing Petitioner's Claims Concerning The Race-Prejudicing Factors.

In McCleskey, this Court reaffirmed its earlier holdings prohibiting "a prosecutor's exercise [of] peremptory challenges on the basis of race ... [and] state efforts to exclude blacks from grand and petit juries." 107 S.Ct. at 1775 n.30. The Court moreover reaffirmed that:

> If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the Constitution requires questioning as to such bias ... [I]n a capital sentencing hearing, a defendant convicted of interracial murder is entitled to such questioning without regard to the circumstances of the particular case.

Id. at 1776 n.30. In the present case, the circumstances indicating a potential for "racial bias ... influenc[ing] a jury"

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[7] For example, the data controlled for factors such as use of a firearm (black defendants' chance of death 24 times greater), victim and defendant not acquainted (60 times greater), felony circumstance (19 times greater), multiple victims (8 times greater), apparent torture of the victim (6 times greater), and apparent danger to others (12.5 times greater). See id. at 10-11, 17-19.

Petitioner also would have presented a detailed comparison between the facts of this case and the facts of other Utah capital cases, and would have shown thereby that in cases involving white defendants, facts comparable to those in the present case (and even facts more extreme than those in the present case) have not produced a sentence of death. See id. at 26-29.

were manifestly strong enough to warrant an evidentiary hearing to explore "such bias," especially under the more protective standard applied to "capital sentencing hearing[s] [in which] ... a defendant [is] convicted of interracial murder." Id.

Petitioner's allegations that the prosecutor had used the peremptory challenge to produce an all-white jury warranted a hearing under the standard established in Batson v. Kentucky, 106 S.Ct. 1712 (1986). His allegations of race-biasing aspects of the local jury selection system warranted a hearing under Vasquez v. Hillary, 474 U.S. 254 (1986). His allegations that the jury was composed primarily of members of a religious group that deemed blacks to be morally inferior to whites sufficed to indicate a likelihood of racial bias that should have been explored. Cf. Turner v. Murray, supra, 106 S.Ct. at 1687-1688. Finally, and perhaps most important of all, the jury's exposure to the "Hang the Niggers" note and its potential exposure to prejudicial media coverage and community attitude just before the sentencing hearing, necessitated a questioning of the jurors that the state trial court never conducted. Cf. Batson v. Kentucky, supra, 106 S.Ct. at 1721-24; Turner v. Murray, supra, 106 S.Ct. at 1688; Ristaino v. Ross, 424 U.S. 589, 596-97 (1976).[8]

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[8] As a matter of due process, in cases in which a juror has been exposed to an "extraneous influence" (Mattox v. United States, 146 U.S. 140, 149 (1892)), "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982); accord, Tanner v. United States, 55 U.S.L.W. 4942, 4946 (U.S., June 22, 1987); Remmer v. United States, 347 U.S. 227 (1954). The note and the false press reports in this case were clearly the type of "extraneous influence" that would bring the case within "[t]he Court's holdings requiring an evidentiary hearing where [an] extrinsic influence ... [has] tainted the deliberations." Tanner v. United States, supra, 55 U.S.L.W. at 4946. Accordingly, petitioner had a right to an evidentiary hearing on the biasing effect of these influences, and to examine the jurors who had been exposed to them concerning the effect they had. See Smith v. Phillips, supra, 455 U.S. at 217 n.7 ("determinations made in Remmer-type hearings will frequently turn upon testimony of the juror in question").

In Turner v. Murray, supra, this Court observed that "[o]nce rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving inter-racial violence ...; the only question is at what point that risk becomes constitutionally unacceptable." 106 S.Ct. at 1688 n.8. The courts below denied petitioner the opportunity to show that point was reached in this case. Certiorari should be granted to determine if that was proper.

B. The Lower Courts' Summary Dismissal Of Petitioner's Claim That Prejudicial Publicity And Inflamed Community Sentiment Impaired The Jurors' Ability To Be Fair And Impartial Also Presents Issues Deserving Review.

In addition to seeking an evidentiary hearing to show that the jury was influenced by race-biasing factors, petitioner sought to present evidence showing that prejudicial media coverage and manifestations of a hostile community atmosphere combined to impair his due process and Sixth Amendment rights to "receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

Prior to trial, defense counsel moved for a change of venue from Weber County to Salt Lake County, on the basis of extensive prejudicial publicity. A survey showed that 91.7 % of the residents of Weber County had heard of the crime, and 93.2 % of those felt that the defendants were guilty. See St. R. 158. Notwithstanding the lack of any evidence--or any finding by the trial court--that a fair trial would be possible in adjacent Davis County, the trial judge granted the prosecution's factually unsubtantiated motion to move the trial there. See St. R. 148; St. T. (hearing of August 5, 1974), at 12, 16. On the day of trial in Davis County, defense counsel reported to the court that:

> More than a fourth of the potential jury venire members have called up and indicated they don't desire to serve, that there have been threatening letters filed, that there have been indications of a great many people signing petitions that they desire to dispatch the defendants somewhere between here and the Mountain Road.

St. T. 11. The extensive publicity and community pressure that prevailed in Davis County is evidenced by the voir dire. As counsel for petitioner pointed out to the District Court in his Memorandum in support of an evidentiary hearing:

> Juror after juror testified the community was "up in arms" (Tr. 868), that "when they had caught the ones that did it" they wanted "to hang the people right there" (Tr. 684B), that their co-workers said the people that committed the crimes should be "caught and prosecuted and put to death" (Tr. 401), that the case was the "number one topic of conversation" (Tr. 427, 915, 1114), that "everybody said they were guilty" and "they don't deserve a trial" (Tr. 1010), "I think they want to get it over and done with," "I think they want to just hang them" (Tr. 498, 1116, 1185, 1258. Several prospective jurors said that, when they were called for jury duty, friends and family members "attempted to tell me what I should do since they knew I was selected" (Tr. 787), or told them the defendants "were guilty and should be executed" (Tr. 1049-50), or "what they would do if they were on the jury" (Tr. 880), or just said they "should vote guilty" (Tr. 542).

R. 718.

The voir dire demonstrates that the effects of the prejudicial publicity and community sentiment reached the venirepersons who were selected as jurors in the case. All the empaneled jurors had heard or read about the case. One had been told by friends and relatives that the defendants "should be punished to a severe degree." St. T. 773. Another said he was aware that the "general feeling in the community was that they should receive capital punishment." St. T. 785. Another said he was "aware of a general public feeling, I would say of guilt." St. T. 1242. Another had been told by his wife that she believed the defendants were guilty and "right justice should be done," St. T. 380, and said if he were to return a verdict in favor of the defendants he would feel compelled to explain this to her. St. T. 380-81. Others simply said more generally that they were aware of the "public feeling" surrounding the case, St. T. 761, or had "heard talk" (St. T. 523). Yet another said that "most

people I have talked to and have been exposed to, feel that it is guilty, and that is the sentiment of the people," St. T. 1289, admitted that he himself had expressed an opinion that "based upon what I have heard, they are guilty, and I think they ought to be taken out and hanged or words to that effect," St. T. 1287, and said his feelings "hadn't changed," St. T. 1301.

The pressures on the jury continued throughout the trial. As petitioner would have shown in an evidentiary hearing, there was a "carnival atmosphere at trial ... [caused by] [t]he number of reporters in the courtroom ... [and] the conduct of newsmen in the courtroom." Sheppard v. Maxwell, supra, 384 U.S. at 358. Petitioner proffered that he would present evidence showing that "spectators and news reporters packed the courtroom, news crews maintained a constant vigil outside in its corridors." R. 362.

In the midst of a trial so beleaguered with spectators and journalists and so much the focus of community attention, a juror received the "Hang the Niggers" note described earlier. The record does not reflect how many jurors actually saw the note, or what effect it had on them, because the trial judge would not question the jurors or permit questioning by defense counsel and the District Court denied an evidentiary hearing on this issue.

Also as described earlier, at the conclusion of the guilt phase, the judge assured the jurors that their verdict had been "reasonable" and then, in disregard for the extensive publicity and community pressure surrounding this case and over the objections of defense counsel, released the jurors for five days prior to the sentencing hearing. St. T. 4114-5. It was during this period that the local media carried false and prejudicial accounts including the false story that the petitioner had directed a clenched fist gesture at the key prosecution witness after the verdict on guilt. St. T. 4120-1. Again, a mistrial was denied at that point without any further inquiry or admonition by the trial judge. Ibid.

Petitioner's claims that "the state trial judge did not fulfill his duty to protect [petitioner] ... from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom", Sheppard v. Maxwell, supra, 384 U.S. at 363, warranted, at the very least, an evidentiary hearing in which petitioner could show the precise nature of the prejudicial influences and the extent to which they actually affected the jury. Because these influences surrounded a capital sentencing hearing, the logic of this Court's decision in Turner v. Murray, supra, calls for particular caution in ensuring that the sentencing jury was not affected by the prejudicial publicity and community presures. As the Court recognized in Turner, capital sentencing proceedings are particularly susceptible to being swayed by prejudice and irrationality. 106 S.Ct. at 1685-86. "[T]he decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence." Id. at 1689 n.12. This is particularly true in a state like Utah, where the jury possesses vast discretion in choosing the factors that it will deem aggravating. See Part III, below; compare Turner v. Murray, supra, 107 S.Ct. at 1687.

In a case such as the present one--in which no court, state or federal, has ever questioned the jurors about their exposure to these influences, or heard the evidence that petitioner has sought to proffer--"the special seriousness" (id. at 1688 n.8) of allegations of prejudice in capital sentencing compels at least an evidentiary inquiry into the extraneous forces that bore upon the jurors who sentenced William Andrews to die.

II.

THE DECISION OF THIS COURT IN TISON V. ARIZONA, 107 S.CT. 1676 (1987) REQUIRES THAT THIS CASE BE SENT BACK TO THE UTAH COURTS FOR A DETERMINATION OF PETITIONER'S INDIVIDUAL CULPABILITY UNDER THE APPROPRIATE CONSTITUTIONAL STANDARD.

In Tison v. Arizona, 107 S.Ct. 1676 (1987), this Court held that "the Arizona Supreme Court applied an erroneous standard in making the findings required by Enmund v. Florida." 107 S.Ct. at 1678. The Arizona Supreme Court had ruled that a defendant can be deemed to possess the requisite "intent to kill" if he "'played an active part'" in a criminal venture and "'could anticipate ... [a co-perpetrator's] use of lethal force'" during the course of that venture. Id. at 1681. Although concluding that "major participation in [a] ... felony ..., combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement," id. at 1688, the Court insisted that state courts must find both of these elements to uphold a death sentence. Ibid. The Court recognized that the facts of Tison "would clearly support a finding that [the Tisons] ... subjectively appreciated that their acts were likely to result in the taking of innocent life," id. at 1685, but instead of making such a finding the Arizona Supreme Court had "attempted to reformulate 'intent to kill' as a species of foreseeability," id. at 1684. That was not entirely impermissible, but neither was it sufficiently precise to pass constitutional muster. Accordingly, this Court vacated and remanded so that the state courts could make the necessary Enmund determination under an appropriate standard.

In the present case, the Utah Supreme Court applied a standard that is essentially identical to the erroneous standard employed by the Arizona Supreme Court in Tison. In concluding that petitioner's death sentence was not disproportionate to the crime, the Utah Supreme Court explained:

> Defendant's complicity in these murders was deep; his actions bold and gross. He indeed significantly aided in triggering a milieu that ended in catastrophe and death -- and did so knowing at the beginning of this episode of terror that it would most probably conclude as it did.

State v. Andrews, supra, 574 P.2d at 711. The Utah Supreme Court's focus on what petitioner foresaw as the "most probabl[e]" outcome of events is equivalent to the Arizona Supreme Court's focus on "foreseeability": "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison v. Arizona, supra, 107 S.Ct. at 1684.

Moreover, the objective facts bearing upon petitioner's level of culpability are far more equivocal than in Tison. Like the Tisons, petitioner was armed with a pistol during the commission of the crime and provided one of the vehicles used. State v. Pierre, supra, 572 P.2d at 1343-44. But unlike the Tisons, who were "physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family," Tison v. Arizona, 107 S.Ct. at 1688, petitioner was not "present when Michelle was raped and all the victims were shot." State v. Andrews, supra, 574 P.2d at 710. Whereas the Tisons never "made an effort to help the victims" and merely claimed after the fact that "they were surprised by the shooting", Tison v. Arizona, 107 S.Ct. at 1679, petitioner on several occasions protested his co-perpetrators' violent behavior. As one of the victims described at trial:

> [petitioner] asked Pierre in the basement of the Hi-Fi Shop, after Pierre had discharged his hand gun (not at that time shooting anyone), "What did you do that for, man?"; ... [petitioner] was nervous and upset ... [and] either before or after the administration of the Drano ... said "I can't do it, I'm scared."

State v. Andrews, supra, 574 P.2d at 709. Whereas Raymond Tison "[b]y his own admission ... was prepared to kill in furtherance of the prison break" and handed over an "arsenal of lethal

weapons ... to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt", Tison v. Arizona, 107 S.Ct. at 1684-85, there was no evidence that petitioner knew in advance that any of his co-perpetrators planned to kill during the robbery, or had killed under similar circumstances in the past.[9]

In rejecting petitioner's Enmund claim, the Tenth Circuit held that this case falls within the hypothetical envisioned by this Court in Cabana v. Bullock, 106 S.Ct. 689, 700 n.6 (1986), "in which the theory on which the case was tried and the evidence received leave no doubt that the jury's verdict rested on a finding that the defendant killed or intended to kill." See Andrews v. Shulsen, supra, 802 F.2d at 1272. The Tenth Circuit engaged in a complex analysis of the lengthy jury instructions to support its conclusion that the jury verdict rested on a finding of intent to kill, id. at 1272-75, which cannot be squared with this Court's post-Enmund decisions.

When this Court in Cabana v. Bullock described the exception for cases in which the jury clearly found intent to kill, the Court used as an example a case in which "a defendant conceded that he committed the killing and defended against the charge of murder only by claiming self-defense." 106 S.Ct. at 700 n.6. This exception cannot apply to a case such as the present one, where the petitioner did not in any way participate in the killing and where an intent to kill, far from being implicit in

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[9] There was testimony that petitioner had made a statement some time before the crime indicating that "he would like to rob a hi-fi shop and would kill anyone who got in his way." State v. Pierre, supra, 572 P.2d at 1343. The exact language reported by the prosecution's witness, George Platco, was: "one of these days I would like to rob a hi-fi shop and if anybody gets in my way I would kill them." State Transcript [hereafter "St. T."] 1549. There was substantial reason to doubt Platco's credibility. See St. T. 1551-56, 3682-83. But, even if his account had been accurate and if the words he reported were not simply an empty boast, petitioner's behavior inside the hi-fi store demonstrated that at the time of the crime, he did not intend to kill anyone who got "in [his] way."

the defendant's own version of the facts, is inferred only from the "foreseeability" of the co-perpetrator's commission of the killing. That is amply demonstrated by this Court's refusal to apply the exception in the Tison case.[10]

At the time that the Court of Appeals decided petitioner's claim that his lack of an intent of kill required reversal of his death sentence under Enmund v. Florida, 458 U.S. 782 (1982), it did not have the benefit of this Court's decision in Tison. Since the facts in this case show a level of culpability no greater than that in Tison, and since the Utah Supreme Court assessed these facts under virtually the same erroneous standard employed by the Arizona Supreme Court in Tison, this Court's holding in Tison compels the vacating of petitioner's death sentence and the return of the case to the Utah courts to appraise the record under the proper constitutional standard in the first instance.

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[10] Moreover, the Tenth Circuit's highly technical analysis ignored other plausible readings of the jury instructions, and overlooked the crucial role of the prosecutor's arguments. The prosecutor argued extensively to the jury that it could convict petitioner of capital murder simply on the basis of an intent to "help the murderer escape" in conjunction with a failure to effectively withdraw from the crime by "completely destroy[ing] the effectiveness of his contribution to the commission of the crime." St. T. 3815, 4092-94. Even assuming arguendo that the jury instructions could be read in conjunction as requiring the jury to find intent to kill, the complexity of the instructions (see Cabana, supra, 106 S.Ct. at 695-96 n.2) "[i]n combination with ... the comments of the prosecutor ... create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury," California v. Brown, 107 S.Ct. 837, 842 (1987) (O'Connor, J., concurring).

Finally, in Enmund itself the state trial court (which was there the ultimate sentencer) had made explicit factual findings that Enmund was the triggerman (458 U.S. at 786-87 n.2), but this Court held that they could not save Enmund's death sentence since its approval by the Florida Supreme Court had rested upon the view that such findings were not necessary to support a constitutional death sentence. Ibid. Here too, the theory upon which the Utah Supreme Court upheld petitioner's death sentence did not endorse the notion that a finding of intent to kill had been made at the trial level but rested upon a broader ground that makes any implied jury findings based upon an exegesis of the jury charge "irrelevant to the constitutional issue." Ibid.

III.

THIS CASE PRESENTS AN INSTRUCTIVE VARIANT OF THE IMPORTANT ISSUE ON WHICH CERTIORARI HAS RECENTLY BEEN GRANTED IN LOWENFIELD v. BUTLER: WHETHER A DEATH SENTENCE CAN CONSTITUTIONALLY BE IMPOSED WITH NO FINDING OR CONSIDERATION OF ANY AGGRAVATING CIRCUMSTANCES OTHER THAN THE ELEMENTS THAT DEFINE THE CRIME OF CAPITAL MURDER

In Lowenfield v. Butler, No. 86-6867 (cert. granted, 55 U.S.L.W. 3852 (June 22, 1987)), this Court granted certiorari for the purpose of determining, inter alia, whether a sentencing scheme that permits a death sentence to be based on "a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions." Lowenfield v. Butler, Petition for a Writ of Certiorari, Question Presented #2.

Like the Louisiana statute at issue in Lowenfield, the Utah capital sentencing statute permits a death sentence to be imposed upon consideration of aggravating factors that do no more than repeat elements of the crime. Under Utah law, first-degree murder, "a capital offense" (Utah Code Ann. § 76-5-202(2)), is defined as "intentionally or knowingly caus[ing] the death of another" under any one of a roster of enumerated circumstances. Utah Code Ann. § 76-5-202(1).[11] The statute does not designate any specific "aggravating circumstances" to be considered by the jury in deciding which persons convicted of capital murder will be sentenced to death, except in Utah Code § 76-3-207, which declares that in capital sentencing hearings, "[a]ggravating circumstances shall include those as outlined in 76-5-202," the statute listing the elements of first-degree murder.[12]

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[11] The version of the statute that was in effect at the time of petitioner's trial and sentencing hearing has been amended. The amendments, which are reflected in Appendix B, do not in any way affect petitioner's case.

[12] The only other statutory reference to aggravating factors is in the statute's explanation of the range of evidence that may be presented in a capital sentencing hearing. The statute states

Thus, Utah law expressly authorizes the jury to decide that a defendant who has been convicted of capital murder deserves a sentence of death, without finding or considering any circumstance other than that the defendant committed the capital murder. A single statutory circumstance like "homicide ... committed for ... personal gain" (Utah Code Ann. §76-5-202(1)(f)) can both elevate a killing to capital murder and thereafter serve as the sole predicate for imposing a sentence of death.

The effect of this statutory scheme is well illustrated in the present case. At the guilt phase of petitioner's trial, the jury returned three general verdicts of first-degree murder, which did not in any way indicate the statutorily enumerated circumstances upon which the jury relied. See St. R. 345.[13] In the sentencing hearing, the jury merely checked the line on the verdict form that stated: "[t]he defendant is sentenced to death". St. R. 419, see App. D-2. The only guidance which petitioner's sentencing jury ever received with respect to the concept of aggravation occurred during the guilt phase, when the court defined the statutory elements of first-degree murder. During the sentencing hearing, the sole instruction to the jury concerning aggravating circumstances was: "You may consider ...

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that: "evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty." Utah Code Ann. § 76-3-207(1) (1973).

[13] The jury was instructed that "[t]he killing would be considered first degree murder if it was committed under any of the following circumstances: A. ... the defendant ... did kill or was a party to the killing of an additional person ... [see Utah Code Ann. § 76-5-202(1)(b) (1973)]; B. ... the killer intentionally created a great risk of death to others than the victims and himself [see Utah Code Ann. § 76-5-202(1)(c) (1973)]; C. [t]he killing was in perpetration of a robbery [see Utah Code Ann. § 76-5-202(1)(d) (1973)]; D. [t]he killing was in perpetration of rape [see Utah Code Ann. § 76-5-202(1)(d) (1973)]; E. [t]he killing was for ... pecuniary gain [see Utah Code Ann. § 76-5-202(1)(f) (1973)]; F. [t]he killing was for personal gain [see Utah Code Ann. § 76-5-202(1)(f) (1973)]". State Record [hereafter "St. R."] 351-52.

[a]ny factor in ... aggravation that would be considered by a responsible person making such a decision in an appropriate manner." St. R. 413-4, App. C-3-4.[14] The judge left it to the jurors to "consider all evidence received ... during the trial itself ... which is helpful to the jury in determining what the sentence should be." St. R. 413, App. C-4.

In short, the jury was not required to report what if any factors in aggravation it may have found or considered--at either stage of trial--and the instructions allowed it to sentence petitioner to death without finding or attending to a single fact or circumstance that went beyond the minimum elements of the offense sufficient to warrant a conviction.

This Court has said that "[a] capital sentencing scheme must ... provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The very purpose of aggravating circumstances in capital sentencing is to "genuinely narrow the class of persons eligible for the death penalty and ... reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). When, as in the Utah capital sentencing scheme, any factor that renders a homicide "capital murder" also suffices to support the imposition of the sentence of death upon an individual convicted of capital murder, the sentencing scheme fails to "genuinely narrow the class of persons eligible for the death penalty." Ibid.

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[14] The jury instructions contained a set of factors that the jury "may consider", which were not designated as either aggravating or mitigating. Ibid. A comparison of this portion of the instructions and the statute reveals quite clearly, however, that these are the factors designated by the state legislature as "[m]itigating circumstances." Utah Code Ann. §76-3-207(1) (1973).

Like the decision in Lowenfield, the decision of the Tenth Circuit upholding this sentencing scheme is in direct conflict with decisions of the Eighth Circuit which have repeatedly invalidated death sentences based upon a statutory scheme that allows the same factor to serve as the basis for both a conviction of capital murder and the imposition of a sentence of death. See Collins v. Lockhart, 754 F.2d 258, 263-65 (8th Cir. 1985), cert. denied, 106 S. Ct. 546 (1985); Woodard v. Sargent, 806 F.2d 153, 155-57 (8th Cir. 1986); Ruiz v. Lockhart, 806 F.2d 158, 160-61 (8th Cir. 1986). Certiorari is warranted by this conflict between the circuits.

At the very least, petitioner's case should be held for decision in the light of Lowenfield v. Butler, supra. However, granting certiorari at this time and setting the present case for argument with Lowenfield would serve to further illuminate the issues presented there. The remainder of the statutory scheme under which petitioner was sentenced to death failed to correct--indeed, exacerbated--the discontrol permitted by the statute's lack of any aggravating circumstances apart from the elements of the capital crime.

Utah's death penalty statutes do not appear distinguishable in any relevant respect from several state laws held unconstitutional by this Court in the wake of Furman.[15] They include none of the mechanisms that this Court, in prior reviews of statutory schemes for jury capital sentencing, has characterized as furthering the goal of "'channel[ing] the sentencing decision patterns of juries'" and avoiding the "'pattern of arbitrary and capricious sentencing . . . found unconstitutional in Furman.'" Zant v. Stephens, 462 U.S. 862,

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[15] See, e.g., Moore v. Illinois, 408 U.S. 786 (1972) [see former Ill. Ann. Stat. Chap. 38 § 1-7(G) (1965)]; Davis v. Connecticut, 408 U.S. 935 (1972) [see former Conn. Gen. Stats. Ann. § 53-10 (1967)]; Scoleri v. Pennsylvania, 408 U.S. 939, rehearing denied 409 U.S. 897 (1972) [see former 18 Pa. Stat. Ann. § 4107 (1965)].

877 (1983). In addition to its failure to "narrow the class of persons eligible for the death penalty" (ibid.), the Utah statute lacks any requirement that "the jury . . . find at least one valid statutory aggravating circumstance and . . . identify it in writing", id. at 876. See also Pulley v. Harris, 465 U.S. 37, 51 (1984); Jurek v. Texas, 428 U.S. 262, 267, 269 & n.5 (1976). Nor does it contain any provision for the trial judge to make an "'independent determination as to whether the weight of the evidence supports the jury's findings and verdicts'", Pulley v. Harris, supra, 465 U.S. at 52, or even a mandatory system of appellate review of "every death penalty proceeding", Zant v. Stephens, supra, 462 U.S. at 876; Pulley v. Harris, supra, 465 U.S. at 53.[16]

By considering this case together with Lowenfield, the Court would thus have before it varying statutory schemes presenting a common problem under Furman, one of which presents in fully rounded form the essential question Lowenfield poses: how "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" in capital sentencing. Gregg v. Georgia, 428 U.S. 153, 189 (1976).

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[16]Although the Utah statute presently provides for automatic appellate review in all capital cases, Utah Code Ann. §76-3-206(2) (1978), the provision requiring such review was added in 1977, well after petitioner's trial and sentencing. See Compiler's Note to Utah Code Ann. § 76-3-206 (1978). Prior to that time there was no automatic appeal, even on legal issues, in capital cases. See Gilmore v. Utah, 429 U.S. 1012 (1976). Similarly, although the Utah Supreme Court has said it would construe the statute to require proportionality review in capital cases, it said that after sentencing in this case--indeed, on the appeal of petitioner's co-defendant. See State v. Pierre, supra, 572 P.2d at 1345 & n.9, 1346. There is no statutory authority for any such proportionality review, and it is unclear what it entails: the Utah Court has never purported to compare the sentences imposed in different cases to determine proportionality, and has never reversed a death sentence for any reason other than legal error.

IV.

THIS CASE PRESENTS THE UNRESOLVED QUESTION WHETHER THE EIGHTH AMENDMENT PRECLUDES THE IMPOSITION OF A DEATH SENTENCE DESPITE SUBSTANTIAL DOUBTS AS TO ITS APPROPRIATENESS UNDER THE APPLICABLE STATUTORY STANDARD.

In State v. Wood, 648 P.2d 71 (Utah 1981), the Utah Supreme Court "reject[ed] the proposition that the death penalty may be imposed where there is substantial doubt whether it should be," id. at 80, and held that, before a defendant is sentenced to death the sentencer must find, beyond a reasonable doubt, that the applicable statutory standard has been met. Id. at 83. The Utah Court's reasoning in reaching this conclusion drew heavily on this Court's Eighth Amendment death penalty jurisprudence, and the principles of In re Winship, 397 U.S. 358 (1970), requiring adherence to the reasonable doubt standard in criminal cases.

> Nowhere in the law is the interplay of procedural rules and substantive standards more critical than in the penalty phase of a capital case. Substantive standards must be "objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death. Woodson, 428 U.S. at 303, 96 S.Ct. at 2991. It makes no difference, however, how rational and discriminating the dispositive substantive standards are, if the procedural rules which implement those standards do not provide an effective mechanism for their faithful implementation. Even if Solomon-like wisdom were available in framing objective standards, their whole purpose could be thwarted if the governing procedural rules allowed the sentencing body to impose the death penalty in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of the penalty.
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> In all litigation, both civil and criminal, there is always the possibility of error. Spicer v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). ... "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a primary instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" [In re Winship, 397 U.S. 358, 363 (1970).]

648 P.2d at 81-2.

> To impose the death penalty, notwithstanding, serious doubts as to its appropriateness, would create in some cases--as in this case--a substantial possibility of "arbitrary ... treatment" and permit "penalties which are [not] proportionate," a result that is forbidden by the legislature and that would raise issues of a possible constitutional magnitude."

648 P.2d at 83.

To effectuate this holding the court in Wood required the following instruction to be given to capital sentencing juries:

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

648 P.2d at 83.

Petitioner's trial was the first held under the 1973 Utah death sentencing law, and occurred several years before Wood. The only sentencing standard the jury in petitioner's case was given was in this instruction:

> There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury, but the burden to satisfy the jury that a death sentence is appropriate is on the State.

Sent. Instr. No. 2, St. R. 412. On direct appeal, petitioner's counsel argued that this instruction was inadequate, and that a reasonable doubt standard was required; the Utah Supreme Court rejected that argument. See State v. Andrews, 574 P.2d 709, 710 (Utah 1977). After Wood, the Utah Court reversed itself and held that the exact same sentencing instruction given the jury in petitioner's case "was obviously in error." State v. Norton, 675 P.2d 577, 584 (Utah 1983). However, when petitioner reapplied to the Utah Supreme Court for relief in light of its decision in Wood, that court held that the Wood standard was "nonretroactive" --inapplicable to this case, and this case alone--noting that "Wood ... was grounded in statutory interpretation ...." Andrews

v. Morris, 677 P.2d 81, 91 (Utah 1983).[17] The federal courts below rejected petitioner's arguments against the extraordinary effect of this "nonretroactivity" holding, by emphasizing that "the Wood standard is one of statutory construction of the Utah law and it is in no way a constitutional principle." Andrews v. Shulsen, 600 F.Supp. at 427; see also Andrews v. Shulsen, 802 F.2d at 1270, App. A-15.

We submit this presents a question worthy of this Court's review. As the Utah Court pointed out in Wood, a number of state sentencing statutes follow the reasonable doubt standard as a matter of statutory direction or construction. State v. Wood, supra, 648 P.2d at 84-5. The federal circuits that have considered this issue have rejected such a standard as an Eighth Amendment requirement. See Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983), cert. denied, 464 U.S. 865 (1984); Harris v. Pulley, 692 F.2d 1192, 1195 (9th Cir. 1982). However, this "Court has not addressed the specific issue as to which standard of persuasion the Eighth Amendment through the Due Process Clause of the Fourteenth Amendment, or that clause itself, requires imposing the death penalty," State v. Wood, supra, 648 P.2d at 82, although the issue has drawn the attention of several individual Justices on several occasions in recent years. See, e.g., Teague v. Tennessee, 473 U.S. 911 (1985) (Justices Marshall and Brennan); Pinch v. North Carolina, 459 U.S. 1056 (1982) (Justice Stevens).

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[17] In this opinion the Utah Supreme Court alternatively said that the failure to apply the Wood standard to petitioner's case was harmless error. Andrews v. Morris, supra, 677 P.2d at 95-96. In so doing, it quoted statements from its previous opinions regarding petitioner's co-defendant, Dale Pierre, as if they had applied to petitioner (ibid.), and misstated the facts regarding his absence from the scene at the time of the rape and homicide, which it itself had previously acknowledged, id. at 98. Respondent has never attempted to defend this harmless error analysis, which was obviously based on a serious misreading of the record; and neither of the federal courts below relied on or deferred to it in any way.

The context of this case raises this issue starkly: a single set of defendants, uniquely among the defendants in this state, denied the protection of such a standard, and sentenced under a state law with virtually no other controls on the arbitrary imposition of the death penalty. See Part III, above. If a sentencing standard that removes "substantial doubt" about the appropriateness of a death sentence is ever required, it should have been required in this case.

Because of that--and because the facts of petitioner's case make it one where a different statutory standard may well have made a difference as to the sentence imposed--certiorari should be granted here to resolve this issue, as well.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

Dated: Seattle, Washington
September 8, 1987

APPENDIX A

Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986),
and Order of June 8, 1987, Denying Rehearing

William ANDREWS,
Petitioner-Appellant
Cross-Appellee,

v.

Kenneth V. SHULSEN, Warden of the Utah State Prison, and David L. Wilkinson, Attorney General of the State of Utah, Respondents-Appellees Cross-Appellants.

Washington Legal Foundation,
Amicus Curiae.

Nos. 84-2781, 85-1024.

United States Court of Appeals,
Tenth Circuit.

Oct. 6, 1986.

Habeas petitioner sought relief following state murder conviction and death sentence. The United States District Court for the District of Utah, David K. Winder, J., 600 F.Supp. 408, denied relief, and petitioner appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) Utah's death penalty statute is constitutional; (2) petitioner failed to preserve claim in state court challenging aggravating circumstance of killing for personal gain; (3) sentencing instructions provided sufficient guidance on proper weight to be accorded aggravating and mitigating circumstances; (4) petitioner was not entitled to hearing on claim of racial discrimination in death sentencing; and (5) ... tions did not permit petitioner's conviction for first-degree murder without sufficient finding that he personally intended to kill or intended that life would be taken.

Affirmed.

1. Criminal Law ⇐1208.1(4)

Discretion inherent in capital sentencing decisions must be suitably directed and limited so as to minimize risk of wholly arbitrary and capricious action.

2. Criminal Law ⇐1208.1(2)

Valid capital punishment statute must prescribe aggravating circumstances or their equivalent which genuinely narrow class of persons who are subject to execution.

3. Criminal Law ⇐1208.1(5)

If prosecution establishes that defendant's crime fits at least one legislatively defined category of persons subject to execution, sentencing body may consider relevant nonstatutory aggravating factors and must be allowed to consider any mitigating evidence before deciding on death sentence.

4. Criminal Law ⇐1208.1(6)

Sentencing phase of capital case involves an individualized determination of appropriate penalty based upon relevant characteristics of defendant and circumstances of offense.

5. Criminal Law ⇐1208.1(6)

Jury which imposes death sentence need not make specific written findings of aggravating and mitigating circumstances for purposes of review if sentencing mechanism is otherwise valid.

6. Homicide ⇐351

Utah's statutory death sentencing scheme, which restricts capital homicides to intentional or knowing murders committed under eight aggravating circumstances, all elements of crime of first-degree murder, is constitutional. U.C.A.1953, 76-5-202.

7. Habeas Corpus ⇐45.3(1.50)

Habeas petitioner did not show prejudice so as to excuse procedural default in failing to raise in state court his claim that aggravating circumstance used in imposing death sentence could not withstand scrutiny; even if that circumstance was constitutionally overbroad as claimed, two other statutory grounds for death sentence existed.

8. Criminal Law ⇐1213.8(8)

Eighth Amendment does not require jury to identify aggravating circumstances it has relied upon to convict capital defendant. U.S.C.A. Const.Amend. 8.

9. Criminal Law ⇐1172.9

When one charged aggravating circumstance later proves invalid or unsupported by record, validity of death sentence depends on function of jury's finding of an aggravating circumstance under state's capital sentencing statute, and on reasons that aggravating circumstance at issue in particular case was found to be invalid.

10. Criminal Law ⇐1208.1(6)

When at least one statutory aggravating circumstance has been established, specific standards for balancing aggravating against mitigating circumstances are not constitutionally required, and thus, sentencing authorities may determine defendant's fate without regard for burdens of proof or other measures of certainty.

11. Criminal Law ⇐796

Jury should be instructed that law recognizes circumstances which may be considered as extenuating or otherwise reducing defendant's culpability and hence his punishment.

12. Criminal Law ⇐796

Instructions in capital sentencing phase were not insufficient with regard to proper weight to be accorded aggravating and mitigating circumstances, where trial judge recited statutory mitigating circumstances, did not stress significance of aggravating circumstances but simply listed relevant factors, directed jury to consider any other factor in mitigation or aggravation that would be considered by responsible person, instructed jury to weigh various factors, and required state to bear burden of demonstrating that death was appropriate penalty.

13. Criminal Law ⇐1213.8(8)

Pattern of discriminatory or otherwise arbitrary sentencing decisions in capital cases can violate Eighth Amendment re-

gardless of intent. U.S.C.A. Const.Amend. 8.

14. **Habeas Corpus** ⇐90.2(10)

Habeas petitioner failed to make sufficient showing of discrimination in statutory scheme under which he received death penalty so as to be entitled to evidentiary hearing.

15. **Courts** ⇐100(1)

Constitution neither prohibits nor requires retroactivity of judicial decisions.

16. **Constitutional Law** ⇐253(4)

State in defining limits of adherence to precedent may make choice for itself between principle of forward operation and that of relation backward; either choice affords due process of law. U.S.C.A. Const.Amends. 5, 14.

17. **Constitutional Law** ⇐250.3(1)

State supreme court, in applying retroactively its decision on aggravating and mitigating circumstances to capital cases pending on direct appeal but not cases already filed, did not violate equal protection rights of defendant in latter group; court drew rational distinction in concluding that state's interest in finality of criminal convictions warranted retroactive application only to direct appeals. U.S.C.A. Const. Amends. 5, 14.

18. **Courts** ⇐100(1)

State supreme court, by applying retroactively its decision on aggravating and mitigating circumstances to capital cases pending on direct appeal but not to cases already final, did not violate established principles of retroactivity; court confronted question of first impression in state, exhaustively analyzed relevant federal cases and reached reasonable result.

19. **Criminal Law** ⇐1213.8(8)

Eighth Amendment prohibits imposition of death penalty upon one who does not himself kill, attempt to kill or intend that killing take place or that lethal force will be employed. U.S.C.A. Const.Amend. 8.

20. **Habeas Corpus** ⇐85.1(2)

Death sentence may rest upon guilty verdict which necessitates finding of intent, or upon appropriate factual findings made by state trial judge or appellate court; if so, it is presumed correct in subsequent federal habeas proceedings, and if not, federal court must afford state court opportunity to make requisite finding.

21. **Homicide** ⇐305

Instructions defining party to murder, as prosecution of defendant who was present at but did not actually commit murder in question, did not permit defendant's conviction for first-degree murder without sufficient finding that he personally intended to kill or intended that life would be taken.

Timothy K. Ford, Seattle, Wash., for petitioner-appellant, cross-appellee.

Earl F. Dorius, Asst. Atty. Gen. (David L. Wilkinson, Atty. Gen., and David J. Schwendiman, Asst. Atty. Gen.), State of Utah, Salt Lake City, Utah, for respondents-appellees, cross-appellants.

Daniel J. Popeo and George C. Smith on the brief for Washington Legal Foundation, amicus curiae, Washington, D.C.

Before McKAY, McWILLIAMS, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

William Andrews appeals from an order of the United States District Court for the District of Utah dismissing a habeas corpus petition challenging the constitutionality of his death sentence. *See Andrews v. Shulsen*, 600 F.Supp. 408 (D.Utah 1984) (*Andrews IV*). We affirm.

I.

BACKGROUND

The facts of this case, as reported in opinions of the Utah Supreme Court, are as follows:

"[Dale Pierre,] Andrews, and [Keith] Roberts were airmen stationed at Hill

Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by [Pierre] in company with Andrews, who aided [Pierre] by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. [Pierre] and Andrews both had hand guns and [Pierre] finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by [Pierre] just before he shot her) and Carol Naisbitt.

. . . .

"[A]fter shooting [Orren Walker, Pierre] vehemently kicked a ball point pen into one of his ears and attempted to strangle him with a cord."

State v. Pierre, 572 P.2d 1338, 1343–44 (Utah 1977) (footnote omitted), *cert. denied*, 439 U.S. 882, 99 S.Ct. 219, 58 L.Ed.2d 194 (1978).

"Evidence by witness Orren W. Walker, Jr. at the guilt phase revealed that [Andrews] asked Pierre in the basement of the Hi-Fi Shop, after Pierre had discharged his hand gun (not at that time shooting anyone), 'What did you do that for, man'; that [Andrews] was nervous and upset; that when Walker made no movement after being told by Pierre to administer the Drano to Michelle Ansley, Stanley Walker, and Cortney Naisbitt, [Andrews] said to Walker, 'Man, there is a gun at your head'; that either before or after the administration of the Drano to the victims [Andrews] said: 'I can't do it, I'm scared', though Walker stated he did not know to what this remark of [Andrews'] referred; and that Andrews, who left and returned to the basement on more than one occasion during the evening of April 22nd, was not observed firing any gun nor was he present when Michelle was raped and all the victims were shot."

State v. Andrews, 574 P.2d 709, 709–10 (Utah 1977) (*Andrews I*), *cert. denied*, 439 U.S. 882, 99 S.Ct. 219, 58 L.Ed.2d 194 (1978).

"Evidence further established that Orren and Stanley Walker were robbed in an aggravated manner of personal property in their possession (equipment from the Hi-Fi Shop being taken from Stanley and a watch and wallet being taken from Orren) . . . by [Pierre], Andrews, and Roberts. [Pierre] and Andrews were identified inside of said shop during the robbery and Roberts was identified walking in front of it."

Pierre, 572 P.2d at 1343.

The three men were apprehended and tried together before a jury. Andrews and Pierre were found guilty on three counts of first degree murder and two counts of aggravated robbery. Roberts was convicted of aggravated robbery, but the jury was unable to reach a verdict on the murder charges. After a separate sentencing hearing, the same jury voted unanimously to impose the death penalty on Andrews and Pierre for each of the murder convictions. On November 27, 1974, the trial judge sentenced them to death before a firing squad. During the next six years, Andrews unsuccessfully challenged his conviction and sentence on direct appeal, *see Andrews I*, 574 P.2d 709, and in collateral state proceedings, *see Andrews v. Morris*, 607 P.2d 816 (Utah) (*Andrews II*), *cert. denied*, 449 U.S. 891, 101 S.Ct. 254, 66 L.Ed.2d 120 (1980).

In November 1980, Andrews filed this action for federal habeas corpus relief. The State responded by moving to dismiss his petition on the merits and on the basis of alleged procedural defaults in the state courts. While the federal proceedings were pending, the Utah Supreme Court decided *State v. Wood*, 648 P.2d 71 (Utah 1981) (per curiam), *cert. denied*, 459 U.S. 988, 103 S.Ct. 341, 74 L.Ed.2d 383 (1982), which raised the burden of persuasion in the sentencing phase of Utah capital cases.

The federal district court stayed further proceedings while Andrews again sought collateral state relief. The Utah Supreme Court declined to apply *Wood* retroactively and denied Andrews' petition for relief. *See Andrews v. Morris*, 677 P.2d 81 (Utah 1983) (*Andrews III*).

The district court then ordered the parties to address all outstanding issues. In his second amended petition, Andrews claimed that: (1) Utah had denied him a fair and impartial jury trial; (2) the Utah capital punishment statute was unconstitutional; (3) the statute resulted in the arbitrary and capricious imposition of the death penalty; (4) the Utah Supreme Court unconstitutionally failed to apply the *Wood* decision retroactively; (5) his death sentence is improper under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), because there was no finding that he intended to kill; (6) Utah's provision for execution before a firing squad violates the Establishment Clause; and (7) this method of execution constitutes cruel and unusual punishment.

The district court concluded that no evidentiary hearing was required to reach a decision, *see Andrews IV*, 600 F.Supp. at 415–16, declined to resolve the issue of procedural default, *see id.* n. 4, and ruled against Andrews on the merits of his claims, *see id.* at 415–32. Accordingly, the court denied Andrews' petition for a writ of habeas corpus and dismissed the action. *See id.* at 432. This appeal followed. With the State's consent, *see* Transcript of Oral Argument at 31–33, we withheld our resolution of the case pending the Supreme Court's decision in *Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

II.

FAIRNESS OF ANDREWS' TRIAL

Andrews asserts that adverse publicity and hostile community sentiment undermined his right to a fair trial, and that he is entitled to a federal evidentiary hearing on this claim. Having reviewed the briefs and the appellate record, we conclude that no hearing is required under the principles of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and that the constitutional standard for a fair trial has been met. We agree with the district court's treatment of these two issues. Accordingly, we adopt the relevant portion of that court's opinion as our own. *See Andrews IV*, 600 F.Supp. at 415–20.

III.

CONSTITUTIONALITY OF UTAH DEATH PENALTY STATUTE

[1] We next address Andrews' claim that the Utah death penalty statute is unconstitutional. The Supreme Court has mandated that the discretion inherent in capital sentencing decisions "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *accord Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). Although the constitutionality of capital punishment laws ultimately turns on an examination of each distinct system, *e.g.*, *Pulley v. Harris*, 465 U.S. 37, 45, 104 S.Ct. 871, 876, 79 L.Ed.2d 29 (1984); *Zant*, 462 U.S. at 874–75, 103 S.Ct. at 2741, the Supreme Court has emphasized several points which guide our consideration of this case.

[2–4] A valid capital punishment statute must prescribe aggravating circumstances or their equivalent which genuinely narrow the class of persons who are subject to execution. *Zant*, 462 U.S. at 876–78, 103 S.Ct. at 2742–43; *Godfrey v. Georgia*, 446 U.S. 420, 423–29, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398 (1980) (plurality opinion); *accord Pulley*, 465 U.S. at 53, 104 S.Ct. at 881; *Jurek v. Texas*, 428 U.S. 262, 270–71, 96 S.Ct. 2950, 2955–56, 49 L.Ed.2d 929 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. 242, 250 & n. 8, 256 n. 14, 96 S.Ct. 2960, 2965 & n. 8, 2968 n. 14, 49 L.Ed.2d 913

(1976) (opinion of Stewart, Powell, and Stevens, JJ.). If the prosecution establishes that a defendant's crime fits at least one of these legislatively defined categories, the sentencing body may consider relevant nonstatutory aggravating factors, *see California v. Ramos*, 463 U.S. 992, 1008, 103 S.Ct. 3446, 3457, 77 L.Ed.2d 1171 (1983); *Zant*, 462 U.S. at 878, 103 S.Ct. at 2743, and must be allowed to consider any mitigating evidence before deciding on a death sentence, *see Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *accord Eddings v. Oklahoma*, 455 U.S. 104, 110–12, 102 S.Ct. 869, 874–75, 71 L.Ed.2d 1 (1982). The sentencing phase of a capital case thus involves an individualized determination of the appropriate penalty based upon relevant characteristics of the defendant and the circumstances of his offense. *Ramos*, 463 U.S. at 1006, 103 S.Ct. at 3456; *Zant*, 462 U.S. at 879, 103 S.Ct. at 2743. Notwithstanding the wide range of information the jury may consider, its ultimate exercise of discretion is invariably focused through instruction on the various factors. *See, e.g., Pulley*, 465 U.S. at 53, 104 S.Ct. at 881; *Proffitt*, 428 U.S. at 258, 96 S.Ct. at 2969; *Gregg*, 428 U.S. at 197–98, 96 S.Ct. at 2936.

[5] The Court has upheld only sentencing schemes that provide for some form of meaningful appellate review. *See Pulley*, 465 U.S. at 54–59, 104 S.Ct. at 881–884 (Stevens, J., concurring in part and in the judgment) (reviewing cases). A jury need not make specific written findings of aggravating and mitigating circumstances for purposes of review if the sentencing mechanism is otherwise valid. *See Jurek*, 428 U.S. 262, 96 S.Ct. at 2952 (juries required only to answer three general questions in order to impose death penalty).

A. The Utah Statute

[6] We hold that Utah's statutory sentencing scheme is constitutional. The State has restricted capital homicides to intentional or knowing murders committed under eight aggravating circumstances.[1] *See* Utah Code Ann. § 76–5–202 (1973) (current version at § 76–5–202 (1986 Supp.)). These circumstances are elements of the crime of first degree murder. One or more must therefore be proved beyond a reasonable doubt in the guilt phase of a capital case.

First degree murder is punishable by death or life imprisonment, *see id.* § 76–3–206 (1973), and a separate hearing takes place upon conviction to determine a defendant's sentence, *see id.* § 76–3–207(1) (1973) (current version at § 76–3–207 (1986 Supp.)). The parties may present evidence on any matter the court deems relevant to sentencing, "including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty." *Id.* § 76–3–207(1) (1973). Aggravating circumstances include, but are not limited to, those listed as

1. The enumerated aggravating circumstances are:

"(a) The homicide was committed by a convict under sentence of imprisonment.

(b) At the time the homicide was committed the actor also committed another homicide.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assault or arson, burglary or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect."

Utah Code Ann. § 76–5–202(1) (1973). The current statute lists seventeen aggravating circumstances. *See id.* § 76–5–202(1) (1986 Supp.). We express no opinion on its constitutionality but confine our attention to the 1973 statutes under which Andrews was sentenced.

elements of first degree murder. *See id.* Section 76–3–207(1) specifies six mitigating circumstances and authorizes the consideration of any other mitigating factors.[2] *See id.* Although the statute mandates no particular burden of proof, the Utah Supreme Court held in connection with this case that the totality of evidence of aggravating circumstances must outweigh the totality of mitigating circumstances by a preponderance of the evidence in order to impose the death penalty.[3] *See Pierre*, 572 P.2d at 1347–48. The court or jury which convicts a capital defendant determines his sentence, although the defendant may waive the jury at the penalty phase and be sentenced by the court. Utah Code Ann. § 76–3–207(1) (1973). A jury verdict imposing the death penalty must be unanimous. *Id.* § 76–3–207(2) (1973).

A capital defendant who has been sentenced to death may appeal to the Utah Supreme Court. *Pierre*, 572 P.2d at 1345; *see also* Utah Code Ann. § 76–3–207(3) (1973) (current version at § 76–3–207(4) (1986 Supp.)). That court conducts "a comprehensive review of the entire case, including a review of a sentence of death to determine if that sentence resulted from prejudice or arbitrary action or was disproportionate to the [crime]." *Pierre*, 572 P.2d at 1345. Furthermore, the court considers prejudicial errors which are neither assigned nor argued. *See id.* n. 9 (citing *State v. Stenback*, 78 Utah 350, 2 P.2d 1050 (1931)); *State v. St. Clair*, 3 Utah 2d 230, 282 P.2d 323, 327 (1955).

Utah has limited the class of defendants subject to execution by requiring that a jury find at least one statutory aggravating circumstance beyond a reasonable doubt in the guilt phase of a first degree murder trial. *See Pierre*, 572 P.2d at 1348. A prescribed list of relevant factors guides the jury's ultimate sentencing decision, and the requirement that aggravating outweigh mitigating circumstances directs the jury to focus upon factors favoring leniency versus death. The jury's discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of Stewart, Powell, and Stevens, JJ.). Appellate review of the entire case ensures that discretion has not been exercised arbitrarily. This form of capital punishment law is constitutionally permissible under prevailing Supreme Court decisions. *See, e.g., Pulley*, 465 U.S. at 53, 104 S.Ct. at 881; *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958.

B. Additional Issues

Andrews raises numerous objections to the Utah statutory scheme, most of which we have considered and implicitly rejected in discussing the statute as a whole. Two remaining issues warrant further discussion. Andrews argues that the jury may have convicted him on the basis of an invalid statutory aggravating circumstance, and that the instructions given in the sentenc-

2. The enumerated mitigating circumstances are:
"(a) The defendant has no significant history of prior criminal activity;
"(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
"(c) The defendant acted under extreme duress or under the substantial domination of another person;
"(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;
"(e) The youth of the defendant at the time of the crime;
"(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
"(g) And any other fact in mitigation of the penalty."
Utah Code Ann. § 76–3–207(1) (1973).

3. Andrews and Pierre were sentenced according to jury instructions embodying this standard. *See Pierre*, 572 P.2d 1338. The Utah court has since decided that the sentencer must find beyond a reasonable doubt both that the aggravating circumstances outweigh those in mitigation, and that the death penalty is appropriate. *See Wood*, 648 P.2d 71.

ing phase did not provide the jury with adequate guidance.[4]

1. Killing for Personal Gain

Andrews argues that one of the aggravating circumstances submitted to the jury in this case, killing for personal gain, cannot withstand scrutiny.[5] He contends that this aggravating circumstance is constitutionally overbroad because practically every deliberate homicide could be viewed as committed for the benefit of the perpetrator. The State responds that even if "killing for personal gain" is overbroad, the trial judge cured the problem by narrowly defining the term when he instructed the jury. His instruction stated:

> "A killing for personal gain is defined in law as a killing so as to gain a substantial advantage or to rid oneself of substantial difficulty. It would be killing for personal gain if the motive for the killing was to silence a witness, prevent the discovery and prosecution of a crime, or to hide the identity of a perpetrator of crime because the escaping of such prosecution would be considered in law as personal gain."

Rec., vol. XVI, state trial rec., vol. R-3, at 352. The district court held that this instruction satisfied constitutional concerns. *See Andrews IV*, 600 F.Supp. at 424.

[7] We do not reach the merits of this contention because Andrews failed to preserve this claim in state court. When "a defendant has failed to abide by a State's procedural rule requiring the exercise of legal expertise and judgment, ... [he] may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" *Reed v. Ross*, 468 U.S. 1, 11, 104 S.Ct. 2901, 2908, 82 L.Ed.2d 1 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982)). Andrews argues that he is entitled to an evidentiary hearing on the question of cause. However, we need not decide whether Andrews could satisfy the cause requirement because we conclude for the following reasons that he was not prejudiced.

[8] Even if the "personal gain" aggravating circumstance is constitutionally overbroad, we are required to sustain Andrews' death sentences because of the unimpeachable presence of two other statutory grounds. The case was submitted to the jury on six theories of aggravation. *See supra* note 5. Although the jury did not specify which of these aggravating circumstances it had found, the Eighth Amendment does not require a jury to identify the aggravating circumstances it has relied upon to convict a capital defendant under a statute such as Utah's. *See Jurek*, 428 U.S. at 265 n. 1, 267-68, 96 S.Ct. at 2953 n. 1, 2954.

[9] When one of the charged circumstances later proves invalid or unsupported by the record, however, the validity of the death sentence "depends on the function of the jury's finding of an aggravating circumstance under [the State's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue in [the] particular case was found to be invalid." *Zant*, 462 U.S. at 864, 103 S.Ct. at 2736. Here, like the Georgia statute in *Zant*, aggravating circumstances function in the guilt phase to narrow the class of persons who may be sentenced to death. *See id.* at 874, 879, 103 S.Ct. at 2741, 2743.

In *Zant*, the Court was clearly concerned with the reliability of the jury's determination that the death penalty was appropri-

4. Andrews also claims that specific aggravating circumstances should have been alleged in the state's charging documents. We disagree. Andrews could have requested a bill of particulars but failed to do so. In any event, statutory notice of aggravating circumstances satisfies constitutional requirements under the Due Process Clause. *See Spinkellink v. Wainwright*, 578 F.2d 582, 609-10 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

5. The case was submitted under a total of six theories of aggravation: (1) multiple killings, (2) creating a great risk of death to persons other than the victim and defendant, (3) killing in perpetration of robbery, (4) killing in perpetration of rape, (5) killing for pecuniary gain, and (6) killing for personal gain. *See* rec., vol. XVI, state trial rec., vol. R-3, at 351-52.

ate. "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 884–85, 103 S.Ct. at 2746–47 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The Georgia statute at issue in *Zant* required juries to specify in writing the statutory aggravating circumstances upon which they had relied. The Court could thus be certain that the challenged death sentence rested upon valid circumstances which had been found by the jury in addition to the one later held invalid.

The jury's determination in this case is reliable notwithstanding the general verdict of guilt. Because Andrews and Pierre were each convicted of three murders, the jury could not have failed to find the aggravating circumstance of multiple killings. *See supra* note 5. Similarly, because they were convicted of aggravated robbery, the jury was compelled to find the circumstance of killing in perpetration of robbery. *See id.* Andrews' convictions therefore rest upon at least two well-founded statutory aggravating circumstances which, under the Utah statute, place him in the restricted class of defendants who may be sentenced to death.

The Court in *Zant* also satisfied itself that all evidence relating to the invalid circumstance was otherwise fully admissible at the sentencing phase. *See Zant*, 462 U.S. at 886–87, 890, 103 S.Ct. at 2747–48, 2749. Similarly, the instant case is not one where inadmissible or prejudicial evidence was improperly admitted in connection with the statutory aggravating circumstance of killing for personal gain. Any evidence of killing for personal gain was admissible as evidence of the crime and also admissible as evidence of non-statutory aggravating circumstances under Utah Stat. Ann. § 76-3-207(1) (1973). *See Zant*, 462 U.S. at 885–91, 103 S.Ct. at 2747–50; *cf. Smith v. Murray*, — U.S. —, 106 S.Ct. 2661, 2676–77 & n. 24, 91 L.Ed.2d 434 (1986) (Stevens, J., dissenting) (introduction of highly prejudicial, inadmissible evidence represents independent constitutional violation); *Barclay v. Florida*, 463 U.S. 3418, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

In sum, Andrews can not establish the prejudice necessary to overcome his procedural default.

2. Sufficiency of sentencing instructions

[10] Andrews also argues that the instructions in the sentencing phase were insufficient with regard to the proper weight to be accorded aggravating and mitigating circumstances. Appropriate sentencing instructions in a capital case guide the jury in its deliberations and focus attention upon the relevant factors to be considered. When at least one statutory aggravating circumstance has been established, "*specific standards* for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant*, 462 U.S. at 876 n. 13, 103 S.Ct. at 2742 n. 13 (emphasis added); *see also Ford v. Strickland*, 696 F.2d 804, 817–19 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). Thus, sentencing authorities may determine a defendant's fate without regard for burdens of proof or other measures of certainty.

[11] At the same time, a jury should be instructed that the law recognizes circumstances which may be considered as extenuating or otherwise reducing a defendant's culpability and hence his punishment. *See Spivey v. Zant*, 661 F.2d 464, 471 & n. 8 (5th Cir.1981), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982); *accord Goodwin v. Balkcom*, 684 F.2d 794, 800–03 (11th Cir.1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). In *Spivey*, the court overturned a death sentence where the state trial judge had instructed on the existence of aggravating circumstances while failing to mention that countervailing considerations might counsel in favor of leniency. *See Spivey*, 661 F.2d at 472. The Eleventh

Circuit recently reaffirmed its holding in *Spivey* and further held:

> "[T]he Constitution requires that there be no reasonable possibility that a juror will misunderstand the meaning and function of mitigating circumstances, *i.e.*, that the law recognizes the existence of circumstances which in fairness or mercy may be considered as extenuating or reducing the punishment."

Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir.1986) (en banc); *see also id.* n. 16; *People v. Brown*, 40 Cal.3d 512, 220 Cal.Rptr. 637, 709 P.2d 440, 452–53 (1985) (en banc) (jury instructed not to consider sympathy for defendant), *cert. granted sub nom. California v. Brown*, — U.S. —, 106 S.Ct. 2274, 90 L.Ed.2d 717 (1986).

[12] The sentencing instructions in this case provided sufficient guidance. The Utah statute identifies and lists both aggravating and mitigating circumstances. *See supra* pp. 1261–62 & notes 2, 3. The trial judge recited the statutory mitigating circumstances, although he did not label them as such or explain their meaning and function.[6] Three aspects of his charge distinguish this case from *Spivey*. First, the judge did not stress the significance of aggravating circumstances but simply listed the relevant factors. Second, at the close of this list, he directed the jury to consider "[a]ny other factor in mitigation or aggravation that would be considered by a responsible person...." *See supra* note 6. Finally, and most importantly, he instructed the jury to weigh these various factors and required the State to bear the burden of demonstrating that death was the appropriate penalty.[7] These instructions emphasized that mitigating factors should be considered and that they could prove decisive in the balancing process. The jury was thus informed of its duty to decide between leniency and death on the basis of mitigating as well as aggravating evidence. Accordingly, we reject Andrews' challenge to the sentencing instructions.

IV.

ALLEGED RACIAL DISCRIMINATION

Andrews contends that the Utah death penalty statute has failed in practice to alleviate the arbitrariness that marked the administration of capital punishment prior

6. Instruction No. 4 reads in pertinent part as follows:

> "You may consider the nature and circumstances of the crime, the character of the defendant, his background, his general personal history, his mental and physical condition, and other factors.
>
> "You may consider
>
> (a) Whether or not the defendant has any significant history of prior criminal activity;
>
> (b) Whether or not murder was committed while the defendant was under the influence of any mental or emotional disturbance or duress;
>
> (c) Whether or not the defendant acted under duress or substantial domination of another person;
>
> (d) The general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct to the standards required by law and whether or not such capacity was substantially impaired as a result of any mental disease, or intoxication;
>
> (e) The youth of the defendant at the time of the crime;
>
> (f) Whether or not the defendant was a party to the murder committed by another person and whether his participation was relatively minor or major;
>
> (g) Any other factor in mitigation or aggravation that would be considered by a responsible person making such a decision in an appropriate manner.

Rec., vol. XVI, state trial rec., vol. R-3, at 414–15.

7. Instructions No. 1 and No. 2 read in pertinent part:

> "It is the duty of the court to instruct you in the law that applies to the sentence procedure.... On the other hand, *it is your exclusive province to determine the sentence in this case, and you should consider and weigh the factors mentioned in this instruction for that purpose.* You may use the instructions given you in the case as they apply.
>
> "You are instructed that it would be improper for you to again debate the question of guilt or innocence of any defendant already found guilty. There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury but *the burden of proof to satisfy the jury that a death sentence is appropriate is on the State.*"

Rec., vol. XVI, state trial rec., vol. R-3, at 412 (emphasis added).

to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.[8] In this context, arbitrariness can mean either purely random application of the death penalty, or its imposition on the basis of a legally irrelevant factor such as race. *Compare id.* at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring), *and id.* at 312–13, 92 S.Ct. at 2763–64 (White, J., concurring), *with id.* at 249–57, 92 S.Ct. at 2731–35 (Douglas, J., concurring), and *id.* at 364–66, 92 S.Ct. at 2790–91 (Marshall, J., concurring). Andrews, a black, claims that racial discrimination impermissibly taints capital punishment in Utah. On appeal, he argues that the district court erred in denying him an evidentiary hearing on this issue.

A hearing would be necessary to receive "any evidence that a *particular* defendant was discriminated against because of his race." *McCleskey v. Kemp*, 753 F.2d 877, 894 (11th Cir.1985) (en banc) (emphasis added), *cert. granted*, — U.S. —, 106 S.Ct. 3331, 92 L.Ed.2d 737 (1986). Conclusory allegations will not suffice to warrant a hearing. *See, e.g., Bashor v. Risley*, 730 F.2d 1228, 1233–34 (9th Cir.), *cert. denied*, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). A habeas petitioner must provide supporting factual allegations. *See Townsend v. Sain*, 372 U.S. at 312, 83 S.Ct. at 756.

Andrews' submissions are inadequate to indicate that evidence of discrimination at his trial would be forthcoming if a hearing were held. He alleges adverse treatment by the prosecution, a racially hostile atmosphere at trial, and bias stemming from improper contact with the jury. We have considered and rejected several of Andrews' claims in deciding that he received a fair an ' impartial jury trial.[9] We add only that the prosecution and defense received ample opportunity to question prospective jurors about racial prejudice, *see Turner v. Murray*, — U.S. —, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and that the jury did not convict Keith Roberts of murder even though he too is black and participated in the robbery which culminated in the murders. To the extent that Andrews presents other issues, his allegations are conclusory and therefore insufficient to warrant a hearing.

Andrews seeks to bolster his position by alleging that Utah's sentencing scheme as a whole imposes the death penalty disproportionately on blacks. In *McCleskey*, the Eleventh Circuit sitting en banc considered the doctrinal basis of race discrimination claims in capital cases, the utility of statistical evidence in evaluating such claims, and the circumstances under which an evidentiary hearing must be granted. The majority observed that a claim of discriminatory sentencing could be framed alternatively as cruel and unusual punishment, as a denial of equal protection, and as a violation of due process. *See* 753 F.2d at 890-92. Whichever was chosen, the majority held that:

> "proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—*i.e.*, race is intentionally being used as a factor in sentencing—can be presumed to permeate the system."

8. The State contends that Andrews defaulted on this claim. However, the Utah Supreme Court considered the merits of the argument in the first state habeas case, notwithstanding the prior procedural default. *See Andrews II*, 607 P.2d at 822, 825. If a state court has reached the merits of a claim, a federal habeas court may do the same despite the existence of a state procedural bar. *See, e.g., Morishita v. Morris*, 702 F.2d 207, 209 (10th Cir.1983); *see also County Court of Ulster County v. Allen*, 442 U.S. 140, 147–54, 99 S.Ct. 2213, 2219–23, 60 L.Ed.2d 777 (1979).

9. One incident involved a stick figure at the gallows that was labeled "Hang the Niggers." Sketched on a napkin, this message was discovered by one or more jurors while on their lunch break at a local restaurant. The district court addressed the legal implications of this incident, *see Andrews IV*, 600 F.Supp. at 419–20, and we have adopted that court's *vie ws* in Part II of this opinion.

Id. at 892. The majority reasoned that because *Furman* invalidated only those capital sentencing schemes that operate in an arbitrary fashion, appropriate procedural safeguards will prevent such a result and allow only the possibility of intentional discrimination. *See id.* at 890–92. An evidentiary hearing need not be granted, the majority added, unless a valid statistical study purports to demonstrate a great enough disparity to indicate intentional discrimination. *See id.* at 892–93; *accord Ross v. Kemp*, 756 F.2d 1483, 1491 (11th Cir.1985) (en banc).

The principal dissenting opinion took a different approach. The dissent interpreted the Supreme Court's death penalty decisions as establishing that a statewide pattern of arbitrary sentencing, particularly one skewed on the basis of irrelevant factors such as race, would violate the Eighth Amendment. *See McCleskey*, 753 F.2d at 910 (Johnson, J., dissenting in part and concurring in part). The dissent further emphasized the importance of ensuring fairness when a defendant's life is at stake. Discretionary sentencing, even under a system with procedural safeguards, permits arbitrariness to play a role yet makes it exceedingly difficult to detect. Statistically significant evidence of disparate impact must therefore be relied upon. Focusing upon intent and setting a correspondingly high standard of proof, the dissent implied, condones potentially serious unfairness.

[13] In our view, a pattern of discriminatory or otherwise arbitrary sentencing decisions in capital cases can violate the Constitution regardless of intent.[10] Unlike the Fourteenth Amendment's guarantee of "equal laws, not equal results," *Personnel Administrator v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979) (sex discrimination), the Eighth Amendment protects against unacceptably inconsistent outcomes. The *Furman* Court invalidated existing death penalty laws not because of the mental state of government officials or jurors but because, as the laws were structured and administered at the time, they failed in practice to distinguish fairly between those who received death sentences and those who did not. *See Gregg*, 428 U.S. at 222–23, 96 S.Ct. at 2947–48 (White, J., concurring in judgment). Each of the concurring opinions in *Furman* relied upon various forms of statistical evidence that purported to demonstrate patterns of random or discriminatory sentencing without regard for an actor's purpose or motive. *See Furman*, 408 U.S. at 249–52, 92 S.Ct. at 2731–33 (Douglas, J., concurring); *id.* at 291–95, 92 S.Ct. at 2753–55 (Brennan, J., concurring); *id.* at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring); *id.* at 313, 92 S.Ct. at 2764 (White, J., concurring); *id.* at 364–66, 92 S.Ct. at 2790–91 (Marshall, J., concurring).

These invalidated statutes contained none of the procedural safeguards which have since been adopted. The decisive question, however, is not whether constitutionally mandated safeguards exist, but whether they work. We do not believe that *Furman* would have been decided differently had the challenged statutes embodied substantial safeguards but yielded no less random or discriminatory results.

10. Even if intent must be proved, we believe that the standard adopted by the majority in *McCleskey* is too stringent. While intent is difficult enough to prove, intent that permeates an entire sentencing system is practically beyond proof. *Cf. Batson v. Kentucky*, — U.S. —, 106 S.Ct. 1712, 1720–21 & n. 17, 90 L.Ed.2d 69 (1986) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), to extent it imposed "crippling burden of proof" on defendants challenging discriminatory exercise of peremptory challenges). Capital defendants are often prepared to demonstrate not only that a disproportionate number of those sentenced to die are black themselves or are the killers of white victims but also that the disparity is statistically significant after accounting for the effect of other explanatory variables. A proffer of this kind meets or exceeds the threshold burden of proof in other contexts where intent must be proved. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) (selection of grand jury venires); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (employment discrimination). To impose a higher burden, as *McCleskey* does, is anomalous even without invoking the need for added fairness in capital cases.

Pre-*Furman* statutes 'were struck down because they failed to generate acceptably consistent outcomes. The intent of actors within the system is not necessarily relevant to the fulfillment of this paramount objective.

The Court has expressly affirmed this conception of the Eighth Amendment in its decisions following *Furman*. Thus "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1764; *see also Gregg*, 428 U.S. at 195 n. 46, 96 S.Ct. at 2935 (opinion of Stewart, Powell, and Stevens, JJ.). Statutory sentencing schemes that provide for appropriate procedural safeguards have been upheld because they "promised to alleviate" arbitrariness. *See Zant v. Stephens*, 456 U.S. 410, 415, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982) (per curiam); *see also Barclay v. Florida*, 463 U.S. 939, 960, 103 S.Ct. 3418, 3430, 77 L.Ed.2d 1134 (1983) (Stevens, J., concurring in the judgment). The constitutionality of such laws therefore depends upon their success in fulfilling this promise. The Court's decisions mandate that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings*, 455 U.S. at 112, 102 S.Ct. at 875. Moreover, "[i]t is of vital importance ... that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (opinion of Stevens, J.). Death is unique among criminal sanctions, and we therefore insist upon a correspondingly higher degree of reliability, consistency, and fairness in capital sentencing decisions. *See, e.g., Zant*, 462 U.S. at 884–85, 103 S.Ct. at 2746–47.

This objective is best accomplished by holding that a pattern of inconsistent sentencing decisions can violate the Eighth Amendment. Juries retain considerable discretion in capital cases. Although the narrowing function served by statutory aggravating circumstances and the availability of appellate review help to ensure that the death penalty will be warranted whenever it is imposed, the additional risk remains that juries will sentence some defendants to death while sparing others who are no less culpable. The pivotal opinions in *Furman* rested upon a perception of just such systemic unfairness, *see Furman*, 408 U.S. at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring); *id.* at 313, 92 S.Ct. at 2764 (White, J., concurring), and it is exceedingly difficult to assess whether this risk has been adequately guarded against. An inquiry into the intent of juries appears all but impossible. On the other hand, properly designed statistical analyses would facilitate such assessments by accounting for all capital cases and determining to what extent the death penalty is imposed, or not imposed, on the basis of relevant characteristics of the defendant and the circumstances of his offense. Evidence of inconsistent results, of sentencing decisions that cannot be explained on the basis of individual culpability, would indicate that the system is not operating fairly and therefore may violate the Eighth Amendment.

Reading *Furman* narrowly, the *McCleskey* majority insists that only an extreme fact pattern like that presented in *Furman* can violate the Eighth Amendment. Reading *Furman* broadly, the dissent would arguably prohibit any statistically significant pattern of random or discriminatory sentencing decisions. *See McCleskey*, 753 F.2d at 911 & n. 8 (opinion of Johnson, J.). We believe there is an appropriate middle ground. Determining the degree of racially disparate impact that violates the Constitution calls for a court's judgment as well as a statistician's findings. Statistically significant results may not always compel the legal conclusion that a statutory sentencing scheme is unconstitutional. In our view, however, statistical findings of the kind proffered in *McCleskey* would warrant such a conclusion. When a defendant is twenty percent more likely to receive the death penalty for committing a moderately aggravated homicide, for the sole reason

that his victim was white rather than black, *see id.* at 913–14, the system under which he is sentenced produces unreasonably inconsistent outcomes.

We need not decide precisely what degree of disparate impact would warrant condemning a capital punishment system because Andrews has not made a sufficient showing to call into question the overall fairness of the statutory scheme under which he received the death penalty. Constitutionally adequate procedures to direct and limit discretion in imposing the death penalty raise a presumption that a capital punishment law operates evenhandedly. *See McCleskey*, 753 F.2d at 897 (presumed that statute operates in constitutional manner). This presumption must be rebutted by proof of either random or systematically disparate sentencing patterns. Such proof should generally consist of an appropriately formal study that generates statistically significant results while accounting for the effect of other causal variables. *See, e.g.*, Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.Rev. 27 (1984). Proffering such a study would create a "reasonable possibility" of establishing a basis for relief and therefore would entitle a federal habeas corpus petitioner to an evidentiary hearing under the principles of *Townsend v. Sain*. *See Ross*, 756 F.2d at 1495 n. 1 (Johnson, J., dissenting in part and concurring in part).

In this case, Andrews alleged the following in his habeas petition:

> "Three of the four persons presently under death sentence in Utah are black, although black people make up less than one percent (1%) of the population of Utah, and a small fraction of Utah murder defendants. Every person sentenced to death under the present Utah law has been an impoverished male whose alleged victim was caucasian. In every case tried under the present Utah statute in which a black person has been charged with murdering a white victim, the case has proceeded to a death sentencing phase; in all but one of those cases, a death sentence has been imposed. In no case in which a non-white person has been a victim of a capital homicide, has a death sentence been imposed, although numerous such cases have been eligible for capital sentences."

Rec., vol. VI, at 1112. The district court held that these small numbers preclude valid statistical analysis. On appeal, Andrews has submitted more current data showing that four of the seven individuals now on Utah's death row are black, still a small population. Although it may be correct that small numbers make predictions difficult, *see generally* Gross & Mauro, 37 Stan.L.Rev. at 93, we are not inclined to condone existing discrimination until enough others have been sentenced and executed to produce a population large enough to analyze. The existence of a small sample should not result in the denial of constitutional rights simply because of the time and place of a defendant's sentence.

However, a small population is not the only problem with Andrews' proffer. He has not developed the evidence that is available so as to provide some factual basis for relief. More importantly, Andrews has failed to address whether other causal factors, such as the degree of aggravation involved in the murders, might account for the sentences of the seven individuals now on Utah's death row. Having collected reports on cases in which the death penalty was withheld, Andrews has neither analyzed these data nor obtained less formal evidence of historical patterns of discriminatory sentencing in the twelve years since his original trial.

Absent careful analysis of sentencing patterns in Utah, we have no basis to conclude that anyone on death row is there because of systemic racial discrimination. In the Georgia study done in *McCleskey*, no sentencing disparity was shown based on the race of the defendant. *See McCleskey*, 753 F.2d at 899. Instead, a statistically disproportionate number of defendants received the death penalty when their victims were white rather than black. *Id.* at 896.

Moreover, the study showed that the race-of-the-victim disparity in Georgia was acute only in those cases where the degree of aggravation involved was in the mid-range. *Id.* In highly aggravated circumstances, the killers of both white and black victims were likely to receive in the death penalty. *Id.* Andrews himself participated in a crime that involved multiple killings and torture of the victims. None of his proffered evidence even remotely suggests the presence of racial discrimination where such highly aggravated murders are concerned. And nothing has been offered to show that the seven individuals on Utah's death row committed less aggravated murders.

[14] In Andrews' particular case, moreover, we find ample indication that the jury sentenced Andrews to death for reasons other than his race or the race of the victims. We have canvassed at length the procedural safeguards employed in this case. The court conducted extensive voir dire on the issue of race to ensure an unprejudiced jury. It gave proper instructions requiring the jury to focus on "the character of the individual and the circumstances of the crime." *See Zant*, 462 U.S. at 879, 103 S.Ct. at 2744. Andrews was permitted to introduce any evidence he chose in mitigation. Most importantly, Andrews' black co-defendant Roberts was not convicted of murder, which strongly indicates that the jury did not reach its verdict for reasons of race. Given these indicia of reliability in the jury's decision to give Andrews the death sentence, together with the absence of evidence indicating a racially disparate impact within the class of highly aggravated murders, we conclude that Andrews is not entitled to an evidentiary hearing on his claim of racially discriminatory sentencing.

V.

RETROACTIVITY OF *WOOD* DECISION

Andrews argues that the Supreme Court of Utah violated his federal constitutional rights when it applied retroactively its decision in *State v. Wood*, 648 P.2d 71, to capital cases pending on direct appeal but not to cases like his that were already final. While no specific standard for balancing aggravating and mitigating circumstances is constitutionally required, *Wood* established as a matter of state law that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt before the death penalty may be imposed. Andrews sought and was denied retroactive relief under this decision. *See Andrews III*, 677 P.2d 81. Three years later, the court applied *Wood* retroactively to cases which, unlike those of Andrews and Pierre, were pending on direct appeal when *Wood* was decided. *See State v. Norton*, 675 P.2d 577, 583–84 (Utah 1983), *cert. denied*, 466 U.S. 942, 104 S.Ct. 1923, 80 L.Ed.2d 470 (1984). Andrews contends that the court denied him equal protection by arbitrarily treating him differently from others similarly situated and that its actions were not based on established principles of retroactivity. We disagree.

[15, 16] The Constitution "neither prohibits nor requires" the retroactivity of judicial decisions. *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Sunburst Oil*, 287 U.S. at 364, 53 S.Ct. at 148. Either choice affords due process of law. *Id.* at 363–64, 53 S.Ct. at 148.

[17] The Due Process and Equal Protection Clauses permitted the Utah court to distinguish between cases on direct appeal and those seeking collateral relief, and to apply *Wood* retroactively to one class but not the other.[11] The court drew a rational

11. Andrews also urges that racial bias accounts for the Utah Supreme Court's decisions. We

distinction in concluding that the State's interest in the finality of criminal convictions warranted retroactive application only to direct appeals. *See Norton*, 675 P.2d at 583–84; *cf. Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38 (1985) (decision regarding illegal confessions applies retroactively to cases pending on direct appeal at time decision rendered). As a case of first impression, moreover, *Andrews III* conflicted with no Utah precedent concerning the retroactive application of judicial decisions to criminal cases that were already final. Andrews protests that he and Pierre alone did not receive the benefit of the standard announced in *Wood*. Although perhaps understandable, this argument is unpersuasive in light of the court's rational basis for drawing a distinction.[12]

[18] A direct challenge to the retroactivity analysis of *Andrews III* affords no additional basis for relief. Employing federal precedent for purposes of guidance, the Utah Supreme Court decided the issue of *Wood*'s retroactivity to Andrews' case as a matter of Utah law. *See Andrews III*, 677 P.2d at 88. It is settled that federal courts may not issue a writ of habeas corpus based upon a perceived error in such a decision. *Pulley*, 465 U.S. at 41, 104 S.Ct. at 874–75. Even if an exceptionally egregious error of state law could result in a denial of due process or equal protection, *see id.*, this is not such a case. The court confronted a question of first impression in Utah, exhaustively analyzed relevant federal cases, and reached a reasonable result. After examining the totality of the circumstances, we find nothing to suggest that the court's conclusion was dictated by this case rather than general principles of retroactivity. The court's conclusion therefore does not warrant federal judicial intervention.[13]

VI.

VALIDITY OF ANDREWS' DEATH SENTENCE UNDER *ENMUND V. FLORIDA*

Andrews finally contends that his death sentences should be overturned because he

reject this claim. Aside from the mistaken assertion that he and Pierre have been singled out for adverse treatment, *see infra* note 12, Andrews has proffered no evidence of the discriminatory intent presently required to prove a denial of equal protection, *see, e.g., Washington v. Davis*, 426 U.S. 229, 239–45, 96 S.Ct. 2040, 2047–50, 48 L.Ed.2d 597 (1976). Absent such evidence, we are confined to considering whether the court's decisions were so inconsistent or unfounded that they violate the Constitution irrespective of intent.

12. We note that, prior to *Wood*, death sentences apparently were imposed and affirmed on direct appeal in at least one other case involving the same standard under which Andrews and Pierre were sentenced. *See State v. Codianna*, 573 P.2d 343, 352 (Utah 1977) (consolidated appeals of three co-defendants), *cert. denied*, 439 U.S. 882, 99 S.Ct. 219, 58 L.Ed.2d 194 (1978); *see also State v. Brown*, 607 P.2d 261, 270 (Utah 1980) (adhering to same standard but reversing because no instruction given on burden of proof). Andrews makes the related point that, immediately after he and Pierre were sentenced, the state attorney general began to advise prosecutors to recommend a reasonable doubt standard. He appears to have taken this position, however, only after a later judicial opinion raised the subject and argued in favor of the more stringent standard. *See Brown*, 607 P.2d at 271–76 (Stewart, J., concurring in the judgment).

13. Andrews relies heavily upon *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). Hicks was convicted of distributing heroin and sentenced under an Oklahoma statute mandating a 40-year prison term for certain habitual offenders. The state appeals court noted that this provision had been declared unconstitutional before Hicks was tried, yet upheld the 40-year term because it fell within the range of punishment which a jury might have imposed. In holding that due process had been violated, the Supreme Court emphasized that Hicks was deprived of a specific statutory right to have a jury fix his sentence on "the frail conjecture" that the result might have been the same had he been afforded this right. *See id.* at 345–46, 100 S.Ct. at 2229. Andrews was deprived of no such entitlement under Utah law. *Cf. Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 697 n. 4, 88 L.Ed.2d 704 (1986). In *Andrews III*, the court considered whether he had a right to be resentenced under *Wood* and decided the question against him. *Hicks* is inapposite.

did not intend that life would be taken.[14] As we previously mentioned, the State agreed that we should wait for the decision in *Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), before deciding this issue.

[19, 20] The Eighth Amendment prohibits imposition of the death penalty upon one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 *see also Cabana*, 106 S.Ct. at 693, 697. A death sentence may rest upon a guilty verdict which necessitates a finding of intent, *see Cabana*, 106 S.Ct. at 695–96, or upon appropriate factual findings made by a state trial judge or appellate court, *see id.* at 696–97. If such a finding has been made, it is presumed correct in subsequent federal habeas proceedings. *Id.* at 697–98. If not, a federal court must afford the state court an opportunity to make the requisite finding. *Id.* at 699–700.

This case was tried and presented to the jury on a theory of intentional or knowing murder rather than felony murder. *Compare Enmund*, 458 U.S. at 789–90 & n. 7, 102 S.Ct. at 3372–73 & n. 7 (noting requirement of culpable mental state to impose death penalty in Utah), *with Cabana*, 106 S.Ct at 696 (case tried on theory of felony murder). The trial judge told the jury in instruction 8 that the prosecution must prove four elements in order to convict Andrews of capital homicide: (1) that the victim was killed intentionally or knowingly, (2) that an aggravating circumstance was present, (3) that the killing occurred at a certain time and place, and (4) that the defendant either killed or was responsible as a "party" to the crime. *See* rec., vol. XVI, state trial rec., vol. R–3, at 351–53. Because Pierre shot and killed each of the victims, the extent of Andrews' culpability depends upon the circumstances under which the jury could have found him to be a party. The trial judge listed four such circumstances at the close of instruction 8:

> "[Andrews] would be a party to murder if:
>
> A. He actually and intentionally perpetrated the murder himself, or
>
> B. He intentionally helped plan or assisted in the advancement of the murder with intent that it would take place, and did not effectively withdraw before the killing.
>
> C. He intentionally rendered active advice during the murder, or
>
> D. He intentionally helped the murderer escape from the immediate scene of the crime.
>
> (The subject of 'party' is described in more detail in a later instruction)"

Id. at 352–53.

In instruction 12, the trial judge defined "party" in greater detail:

> "The statutes of Utah provide that: '*Every person, acting with the mental state required for the commission of an offense, who* directly commits the offense, who solicits, requests, commands, encourages, or *intentionally aids another person* to engage in conduct which constitutes an offense *shall be criminally liable as a party* for such conduct.'
>
> "To be a principal in the accomplishment of a crime where the person under consideration is not the actual doer of the crime, *such person's participation must be intentional and with an intent that his act will further, or cause the crime to come about*, or make easier its completion. A person is not a principal in the crime if he supplies automobiles or weapons to a criminal not knowing that a

14. The State mistakenly argues that Andrews did not preserve the claim that his sentence is excessive in light of the gravity of his offense because he did not intend that life would be taken. Although *Enmund* had yet to be decided, Andrews raised this issue on direct appeal and the Utah Supreme Court decided it. *See Andrews I*, 574 P.2d at 710–11; *accord Andrews II*, 607 P.2d at 818–20, 819 n. 9. The court again decided the merits of this issue on collateral attack in considering the retroactive applicability of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *See Andrews II*, 607 P.2d at 824. Andrews' *Enmund* claim may therefore be addressed.

crime is going to be accomplished, or not knowing the general criminal conduct planned by the person who has received the assistance. A person is a principal in a crime only if he intentionally has aided, encouraged, or assisted in its accomplishment. Assistance rendered after the crime is complete and escape from the immediate crime has been completed, does not make a person a principal of the crime even though he may be guilty of tampering with evidence or some other charge not here brought. In other words, if A commits a crime and B discovers that the crime has been committed and assists A in covering up the crime, B is not guilty as a principal because he is merely involved after the fact.

"A person is a party to a robbery, or rape, or theft, etc., and *he is also a party to the killing* that may occur therein, *only if he knew the killing was planned, or knew it was planned if certain events occur during the crime which does in fact occur*, because he has approved conduct containing a contingent plan to kill, *or if he knows certain co-parties plan to kill if certain contingencies occur*. He would not be a party to such a killing if he does not know of a plan to kill and only suspects such an event may possibly occur, but does not seriously expect it."

Id. at 357 (emphasis added). The trial judge thus instructed that a party must act with the same mental state as that required for commission of the murder, including intent, and the judge otherwise made clear that Andrews must have acted with knowledge that his acts were furthering a deliberate homicide. We note in addition that the judge's initial instruction on the elements of first degree murder, instruction 8, specifically referred to this supplementary instruction defining "parties"; that the judge further charged that his instructions should be considered as a whole and of equal importance regardless of their order, *see id.* at 370; and that the jurors had all of the instructions with them during their deliberations.

[21] In this context, we reject Andrews' arguments that the instructions permitted his conviction for first degree murder without a sufficient finding that he personally intended to kill or intended that life would be taken. He contends there are several alternative scenarios under which the jury could have convicted him without the requisite finding of intent. One alternative focuses upon instruction 13, in which the court instructed the jury that if one plans or assists in the planning of a murder, he has the affirmative duty of either informing the police or destroying his contribution to the crime in order to withdraw effectively and thereby avoid responsibility for capital homicide. *See infra* n. 15. Andrews argues that the jury could have impermissibly found him guilty of capital homicide even if he only assisted early in the crime and had a change of heart, but did not effectively withdraw within the meaning of instruction 13.[15] For the following reasons, we disagree.

Andrews' trial counsel argued in his closing remarks to the jury that while there may have been a plan to commit robbery, there was no premeditated plan to kill. He maintained that Pierre decided to kill only after the parents of two of the young shop

15. Instruction 13 provided in pertinent part:

"Once an individual indulges in planning or the assisting of criminal conduct he is responsible for the furtherance of that criminal conduct unless he has effectively withdrawn. In other words, if A and B plan a crime and A commits his assistance early in the crime, he would be responsible for B's completion of the crime even if A had a change of heart during the commission of the crime unless he effectively withdrew.... In other words, if A and B have planned a crime together and after the beginning of the plan A has supplied some of the ware for the crime or rendered some service during the crime he is responsible for the completion of the crime even though he has had a change of heart, unless he destroys the effectiveness or withdraws the assistance he has given such as the supplying of tools for the crime so that his services or his part in conduct is not in fact an asset of the perpetrator of the crime."

Rec., vol. XVI, state trial rec., vol. R-3, at 358.

workers unexpectedly arrived on the scene, and that Andrews left the premises without ever knowing Pierre's intention to dispose of the witnesses. As one alternative possibility, however, Andrews' counsel contended that if the jury believed Andrews became aware of Pierre's intention to kill, Andrews nonetheless immediately disassociated himself from that intention by leaving. In other words, Andrews' theory was that he never participated or assisted in a plan to kill and that he withdrew his physical presence as soon as he learned of Pierre's intentions, thus never forming the requisite intention. Thus, Andrews did not make a general objection to instruction 13, on withdrawal; he only objected specially that the example of supplying wares such as tools was too narrow. *See supra* note 15. In his objection, Andrews maintained that the example should be deleted, or broadened to include adding and then taking away one's physical presence as the assistance to the crime. The court further alluded to withdrawal in instruction 14 and instructed that "[a]ny verbal or physical acts of withdrawal may be considered by the jury in determining whether taken in total, the verbal and physical acts of an accused demonstrates a withdrawal by him from the criminal act." Rec., vol. XVI, state trial rec., vol. R-3, at 359. The state objected to this instruction on the ground that it overemphasized withdrawal, leaving us to conclude that Andrews sponsored the instruction.

No argument was made at trial or on appeal that even if Andrews formed an intent to kill, he changed his mind at the last minute. No instruction was requested by Andrews to permit the jury to reach such a conclusion. The argument throughout has instead been that the instructions permitted the jury to convict Andrews without finding he formed an intent to kill, and it is this conclusion with which we disagree. As we have previously concluded, Instruction 12 clearly required the jury to find that Andrews knew of the impending murders and that he had the same intention to kill as Pierre. Thus, Andrews' physical withdrawal from the basement was done with the understanding that Pierre fully intended to kill the victims that he, Andrews, had just helped to capture, bind, poison, and rob. Under these circumstances, the trial judge's instructions required a finding of culpability that comports fully with *Enmund*.

We also reject Andrews' contention that the jury could have convicted him under instruction 8 by finding that he intentionally rendered advice during the murder or intentionally helped the murderer escape, without also finding that he intended the murders to occur. Both of these alternatives do mention intent only with respect to *acts* which may have had the effect of assisting Pierre; neither necessarily implies any particular mental state with respect to *the murders* themselves. *See generally* W. LaFave & A. Scott, *Criminal Law* § 64, at 504-05 (1972). Yet the clear requirement of instruction 12 that a party must act "with the mental state required for the commission of an offense" and "with an intent that his act will further, or cause the crime to come about" negates the possibility that the jury could have convicted Andrews without also making the requisite finding that he intended the murders. The jury's failure to convict Roberts, who could readily be viewed as having intentionally assisted Pierre, confirms that the jury acted in accordance with the instructions as a whole and focused on Andrews' intent that the murders take place.

The implicit finding of Andrews' intent by a properly instructed jury, which must be presumed correct under *Cabana*, is supported by the record. Before the Hi-Fi robbery, Andrews said to an acquaintance that "one of these days I would like to rob a Hi Fi Shop and if anybody gets in my way I will kill them." Rec., vol. XVI, state trial rec., vol. T-9, at 1549. Andrews assisted Pierre in capturing and binding the eventual victims. When they begged for mercy, Pierre considered in Andrews' presence whether or not they should be killed. Andrews himself helped to administer what he either knew in advance to be Drano or discerned from the first victims' reactions

to be a poison capable of inflicting grievous harm or death. Andrews did say, "I'm scared. I can't do it." Notwithstanding that such statements may suggest an unwillingness to kill, they also support a clear inference that Andrews knew of Pierre's intention to do so. As Andrews was leaving the basement before the murders occurred, Pierre said to him "about thirty minutes," which further suggests an awareness of what was about to happen. Although Andrews apparently left the shop, someone returned shortly thereafter to pick up Pierre. Andrews also participated in disposing of the stereo equipment and other property stolen from the store. The jury could thus have inferred that Andrews fully acquiesced in the murders even though he himself did not commit them. Under *Enmund* and *Cabana*, the death sentence is not disproportionate to Andrews' knowledge of and participation in the offense.[16]

VIII.

CONCLUSION

We affirm the judgment of the district court denying Andrews' petition for a writ of habeas corpus. Because this is a capital case, when the final order of this court is entered, following the consideration of any rehearing petition that may be filed, we will stay our mandate and the execution of Andrews' death warrant for 30 days pending the filing of a petition for certiorari in the Supreme Court of the United States. If a petition for certiorari is filed within such time, then the stay of our mandate and of petitioner's execution will continue until disposition by the Supreme Court of the petition for certiorari.

16. Andrews also asserts that Utah's provision for execution before a firing squad violates the Establishment Clause of the First Amendment, and that this method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment. Andrews failed to present his Establishment Clause claim in the state courts, which constitutes a default subject to the cause and prejudice test. We conclude that this challenge does not state a colorable claim. Accordingly, we need not inquire whether this test has been met. *See Engle v. Isaac*, 456 U.S. 107, 120 n. 19, 102 S.Ct. 1558, 1567 n. 19, 71 L.Ed.2d 783 (1982). In addition, we find no merit in Andrews' Eighth Amendment claim. *See Andrews IV*, 600 F.Supp. at 431. Utah now allows defendants who have been sentenced to death to select either a firing squad or a lethal injection as the means of execution and mandates lethal injection if a defendant expresses no preference. *See* Utah Code Ann. § 77-18-5.5 (1986 Supp.).

MAY TERM - JUNE 8, 1987.

Before the Honorable Monroe G. McKay, Honorable Robert H. McWilliams and Honorable Stephanie K. Seymour, Circuit Judges.

WILLIAM ANDREWS,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	NO. 84-2781 & 85-1024
	)	
KENNETH V. SHULSEN, Warden of the Utah State Prison, and DAVID L. WILKINSON, Attorney General of the State of Utah,	)	
	)	
Respondents-Appellees,	)	
	)	
WASHINGTON LEGAL FOUNDATION,	)	
	)	
Amicus Curiae.	)	

Appellant's petition for rehearing is denied.

ROBERT L. HOECKER, Clerk

By Patrick Fisher
Chief Deputy Clerk

APPENDIX B

1973 Utah Death Sentencing Statutes

Utah Capital Murder and Capital Sentencing Statutes

At the time of petitioner's trial and sentencing, the Utah statutes provided as follows:

Utah Code Annotated < 6-5-202 (1973):[1]

Murder in the first degree.

(1) Criminal homicide constitutes murder in the first degree if, under circumstances not constituting manslaughter, the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) The homicide was committed by a convict under sentence of imprisonment.

(b) At the time the homicide was committed the actor also committed another homicide.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assault or arson, burglary, or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect . . .

(2) Murder in the first degree is a capital offense.

Utah Code Annotated < 6-3-206 (1973):[2]

Death or life imprisonment.

A person who has been convicted of a capital felony shall be sentenced in accordance with section 76-3-207, and sentence shall be death or life imprisonment as the court or jury, in accordance with this section, shall determine.

---

[1] Since petitioner's trial, this section has been amended to remove the reference to "circumstances not constituting manslaughter" in paragraph (1), change the language of subsection (d), delete subsection (h) and a related paragraph, and add circumstances to the roster of enumerated circumstances. See Utah Code Ann. < 6-5-202(1) (1986 Supp.) & Compiler's Note; Compiler's Note to Utah Code Ann. < 6-5-202 (1978).

[2] Utah Code Ann. < 6-3-206 was amended in 1977, re-codifying the previous version as subsection (1) and adding a new subsection (2) that provides for "automatic review" of "[t]he judgment of conviction and sentence of death . . . by the Utah State Supreme Court." See Utah Code Ann. < 6-3-206 (1978) & Compiler's Note.

Utah Code Annotated < 6-3-207 (1973):[3]

Capital felony--Hearing on sentence.

(1) When a defendant has been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of penalty. The proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury, in which event the hearing shall be before the court. In these proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The defendant acted under extreme duress or under the substantial domination of another person;

(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;

(e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) And any other fact in mitigation of the penalty.

(2) The court or jury, as the case may be, shall retire to consider the penalty. In all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous verdict for death and that to be imposed if a unanimous verdict for death is not found. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment.

(3) Upon any appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment.

---

[3] Amendments to Utah Code Ann. < 6-3-207 in 1982 rendered the provisions applicable to cases in which the defendant pled guilty to a capital felony, established procedures for re-sentencings in cases in which the sentence of death was set aside on appeal, and re-numbered the paragaraphs. See Utah Code Ann. < 6-3-207 (Supp. 1986) & Compiler's Note.

(4) In the event the death penalty in a capital felony is held to be unconstitutional by the Utah supreme court or the United States supreme court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence the person to life imprisonment, and any person who is thereafter convicted of a capital felony shall be sentenced to life imprisonment.

APPENDIX C

Instructions to the Jury at the Sentencing Phase

IN THE DISTRICT COURT OF DAVIS COUNTY, UTAH

- - - - - - - - - - - - - - - -

THE STATE OF UTAH, Plaintiff, vs KEITH ROBERTS, DALE PIERRE, WILLIAM ANDREWS, Defendants.	)	INSTRUCTIONS TO THE JURY ON SENTENCING Case No. 2122

- - - - - - - - - - - - - - - -

MEMBERS OF THE JURY:

No. 1.

It is the duty of the court to instruct you in the law that applies to the sentence procedure, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. On the other hand, it is your exclusive province to determine the sentence in this case, and you should consider and weigh the factors mentioned in this instruction for that purpose. You may use the instructions given you in the case as they apply.

No. 2.

You are instructed that it would be improper for you to again debate the question of guilt or innocence of any defendant already found guilty. There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury but the burden of proof to satisfy the jury that a death sentence is appropriate is on the State.

No. 3.

The jury, when considering a sentence, has a right to know how said sentence might be carried out.

The law of Utah reads:

> "The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant neglects or refuses to make election, the court at the time of passing the sentence must declare the mode and enter the same as a part of the judgment, together with the court's setting of a date for the act."

A judgment of death must be executed by the warden of the state prison, within the interior walls of the state prison. The Board of Corrections of the state prison shall provide the necessary apparatus for the execution.

The warden must invite the presence of a physician and the county attorney of the county; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, that he wishes to be present. Together with such peace officers as the warden may think expedient to witness the execution, but no other persons than those mentioned in this section shall be present at the execution, nor shall any person under age be permitted to witness the same.

In the event you judge a sentence of life, the confinement shall be at the Utah State Prison. Whether a defendant sentenced to life actually serves his life or is released is within the province of the Board of Pardons as that board has total control over the length of such a sentence.

No. 4.

The jury may consider all evidence received by it during the trial itself and shall be judge of whether that evidence does or does not contain material which is helpful to the jury in determining what the sentence should be under these instructions. The jury should also consider all evidence which it has received during this proceeding. The jury should not consider nor be influenced by any information not presented in either the trial itself or during this sentencing proceeding, and should not be influenced in any way by any news reports, rumor, or other information which has reached the jurors, because each side has a right to challenge the evidence reaching the jury, and each side can do so only if they are fully aware of it.

You may consider the nature and circumstances of the crime, the character of the defendant, his background, his general personal history, his mental and physical condition, and other factors.

You may consider

(a) Whether or not the defendant has any significant history of prior criminal activity;

(b) Whether or not murder was committed while the defendant was under the influence of any mental or emotional disturbance or duress;

(c) Whether or not the defendant acted under duress or substantial domination of another person;

(d) The general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct to the standards required by law and whether or not such capacity was substantially impaired as a result of any mental disease, or intoxication;

(e) The youth of the defendant at the time of the crime;

(f) Whether or not the defendant was a party to the murder committed by another person and whether his participation was relatively minor or major;

(g) Any other factor in mitigation or aggravation that would be considered by a responsible person making such a decision in an appropriate manner.

No. 5.

You are instructed that you should not attempt to represent the views of the community as a legislator might do for his constituents, but are to fix the sentence which you as an individual believe is appropriate.

No. 6. You are instructed that you need not pass the same sentence against both defendants, but should decide each case with the same seriousness as you would if it were the only matter before you at this proceeding. You also must fix an appropriate sentence for each count of the verdict of first degree murder. This does not mean that you may not consider whether or not multiple murders were committed in determining the sentence for any one count, because you may do so, but if counts of first degree murder are returned by the jury, which counts are not necessarily a part of one general act, the jury could in proper cases render a different type of sentence for each. The court does not now know, and perhaps will never know, the exact theory each juror acted on in its verdict.

While it may appear to be unnatural to reach inconsistent sentences on different counts as to one defendant, in the event that some type of appellate procedure upsets your conviction of one count or error or further evidence was discovered that upsets the conviction of one count but the other counts and conviction thereon remain, the sentence could then be carried out as to the remaining count or counts.

Your proceeding should be presided over by your foreman, as it should record your findings as to each count as to each defendant. Each count is identified on the verdict form. Below is a

place where you would designate your sentence as presented. It reads as follows:

The defendant is sentenced to death_____.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

You are instructed that it requires the unanimous concurrence of all twelve (12) jurors to render a sentence of either life or death. In the event you you are unable to reach a verdict, the court is required by law to enter a verdict of life imprisonment.

Each juror must make his own decision as to what the sentence should be but should do so only after consideration of appropriate factors with his fellow jurors. He should not hesitate to change when earlier impressions were erroneous. No juror should, however, agree to any sentence which does not represent his own judgment on the matter.

No. 7.

The constitution and laws of this state absolutely prohibit the trial judge from making any comment about the witnesses or the evidence and I am not in any way permitted to assist you in determining what is or is not the truth in this case.

Therefore, you are instructed that if during this trial I have said or done anything which has suggested to you that I am inclined to favor the claim or position of either party, you are not to permit yourselves to be influenced by any such suggestion.

I have not intended to indicate any opinion as to which witnesses are, or are not, worth of belief, nor which party should prevail. If any expression of mine has seemed to indicate an opinion relative to any of these matters, you should disregard it, because you are the sole and only judges of the facts.

Dated this _____ day of November 1974.

_____
Judge

APPENDIX D

Verdicts on Guilt and Sentence

IN THE DISTRICT COURT OF [redacted] COUNTY, UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

WILLIAM ANDREWS,
DALE SELBY PIERRE,
KEITH LEON ROBERTS,

Defendants.

VERDICT

Case No. 2122

We the jury empanelled in the above-entitled action render the verdict as follows in the case of WILLIAM ANDREWS:

COUNT I

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Carol Naisbitt.

Guilty as charged First Degree Murder ✓

Not Guilty _____

COUNT II

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Stanley Walker.

Guilty as charged First Degree Murder ✓

Not Guilty _____

COUNT III

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Michelle Ansley.

Guilty as charged First Degree Murder ✓

Not Guilty _____

COUNT IV

AGGRAVATED ROBBERY, A First Degree Felony committed as follows, to-wit: Said defendant robbed STANLEY O. WALKER, and in the course of committing the robbery, used a deadly weapon, to-wit: a gun.

Guilty as charged of Aggravated Robbery ✓

Not Guilty _____

COUNT V

AGGRAVATED ROBBERY, A First Degree Felony committed as follows, to-wit: Said defendant robbed CHARLES W. WALKER, and in the course of committing the robbery, used a deadly weapon, to-wit: a gun.

Guilty as charged of Aggravated Robbery ✓

Not Guilty _____

Dated this 15th day of November, 1974

Marvin L. Mortensen

Foreman

IN THE DISTRICT COURT OF Weber COUNTY, UTAH

- - - - - - - - - - - - - - - -

THE STATE OF UTAH,	)	
Plaintiff,	)	Case No. 2122
vs	)	VERDICT ON SENTENCE
KEITH ROBERTS, DALE PIERRE, WILLIAM ATCHLEY,	)	
Defendant.	)	

- - - - - - - - - - - - - - - -

We the jury fix sentence as follows as to defendant

WILLIAM ATCHLEY.

COUNT I

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, a Capital Offense committed as follows: to-wit: Said defendant murdered Carol Reisbitt.

The defendant is sentenced to death ✓.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

COUNT II

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Stanley Walker.

The defendant is sentenced to death ✓.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

COUNT III

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Michelle Ansley.

The defendant is sentenced to death ✓.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

Dated this 25th day of November 1974.

419

Marvin L. Mortensen
Foreman

APPENDIX E

Affidavit Containing Petitioner's Proffered Evidence
Regarding Racial Discrimination in Utah Death Sentencing

No. 84-2781

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM ANDREWS,

Petitioner/Appellant,

v.

KENNETH V. SHULSEN, Warden of the Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah,

Respondents/Appellees.

AFFIDAVIT SUPPORTING MOTION TO SUPPLEMENT THE RECORD, AND PROFFER OF EVIDENCE REGARDING PETITIONER'S CLAIM OF RACE DISCRIMINATION

TIMOTHY K. FORD
600 Pioneer Building
Seattle, WA 98104
(206) 622-5942

ATTORNEY FOR PETITIONER/APPELLANT

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM ANDREWS, Petitioner/Appellant, v. KENNETH V. SHULSEN, Warden of the Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah, Respondents/Appellees.	:	No. 84-2781 AFFIDAVIT SUPPORTING MOTION TO SUPPLEMENT THE RECORD, AND PROFFER OF EVIDENCE REGARDING PETITIONER'S CLAIM OF RACE DISCRIMINATION

STATE OF WASHINGTON)
) ss.
County of King)

TIMOTHY K. FORD, on oath, deposes and says:

I am the attorney for William Andrews, and have been at all stages of the proceedings in this case in this Court and in the District Court below. I make this affidavit in support of the Petition for Rehearing from this Court's decision of October 6, 1986, which rejected Petitioner's claim that he should have been afforded an evidentiary hearing on his claims of arbitrariness and race discrimination in the administration of the Utah death sentencing statute.

1. The Procedural History of This Issue Below.

The absence of any evidence, or a proffer of evidence, regarding the race discrimination claims in this case is the result of the District Court's unusual treatment of this issue in the proceedings below.

In June 1981, the District Court granted an evidentiary hearing on the claims of arbitrariness and race discrimination contained in the original Petition for Habeas Corpus filed in this case. The evidentiary hearing did not occur at that time, because the District Court required the Petitioners to file a state habeas corpus petition regarding the application to their case of the Utah Supreme Court's decision later reported as State v. Wood, 648 P.2d 71 (Utah, 1981).

After the Utah Supreme Court denied relief on that Petition, proceedings in the District Court on all issues were renewed. An Amended Petition was filed and Memoranda were filed on both sides, which were limited by the District Court's order to "simply new law". R. XII:11. The Respondent's Memorandum filed at that time asserted primarily that all Petitioner's claims should be dismissed as a matter of law; only as one of many alternative arguments suggesting that a proffer of evidence should be a prerequisite to a hearing. Although the District Court had already granted a hearing, in response, I specifically offered to present a proffer a summary of the evidence on this claim if the District Court required one. Pet. Reply Memo., R. 1411; R. XII:71.

In its Order granting the Respondent's motion, and dismissing the Petition without a hearing, the District Court said nothing about the absence of a proffer. As I understood it, it ruled as a matter of law that race discrimination could not be shown by statistical disparities in the state of Utah, because of the small number of death sentences that had been imposed.

This sequence of events presented no occasion for me to compile and proffer evidence in support of Petitioner's race discrimination claim at any time in the District Court. In this Court, I argued that the District Court was wrong as a matter of law to refuse a hearing because of the small number of cases available. This Court apparently agreed with that position, but nonetheless affirmed the District Court, assuming that the proof Petitioner would have presented was not sufficiently formal and comprehensive, and could not have shown discrimination in cases comparable to William Andrews'.

I believe that assumption is based on the fact that the Court has not has the opportunity to examine the evidence Petitioner would have presented. So it can, since receiving the Court's opinion I have attempted to retrieve and compile the available evidence in a form which this Court could examine. This Affidavit contains that evidence I have been able to put in comprehensible form through these efforts in the time available.

2., The Available Evidence.

The evidence that could have been presented at a hearing on race discrimination in the District Court came from several sources.

a. The Sources of Statistical Evidence.

i. The Prosecutor's Questionnaires.

As part of the discovery process preparatory to the hearing scheduled in 1980, questionnaires were sent out to local County Attorneys by the Attorney General of Utah, requesting information on first and second degree murder cases which had occurred since the effective date of the Utah death sentencing law, in 1973. Copies of the completed questionnaires were provided to Petitioner's counsel through discovery in the District Court.

These questionnaires requested information on a number of variable in each case: the initial charge filed; any aggravating circumstances included in the charge; any plea bargain; the level of conviction and the sentence imposed; any evidence of aggravating and mitigating circumstances presented at a penalty hearing; whether the case was tried to a judge or a jury; the verdict; the defendant's age, race, sex, economic and social status, mental and physical condition, background, prior criminal record, and involvement in the homicide; the number of victims, their names, ages, sex, economic and social status, the location of the crime, a narrative description of it, the presence of any torture, extended period of capture, prolongment of the killing, contemporaneous crimes, injuries to others than the victim, and

other facts in aggravation; and the presence of any of Utah's statutory mitigating circumstances, or other mitigating circumstances recognized by law. These questionnaires did not request two critically important items of information--the victim's race, and the precise date of the offense.

In order to supplement the information thus provided by the Respondent in discovery, I hired a law student to act as an investigator, to obtain information on cases in jurisdictions which had not responded to the Attorney General's requests, and to add in information on variables which were not included in those forms which were provided by the Respondent, to the extent possible. I also obtained information from the Utah Department of Vital Statistics, which keeps information on homicide victimization in the state of Utah, on all homicide deaths from 1973 to 1981. This information, which is available in computer-generated form, contains data on a number of facts about the victim of the crime and the circumstances of their death.

I have periodically supplemented this information with additional cases involving individuals who have been charged or convicted of first degree murder in the state of Utah, which have come to my attention since the time the data was gathered in 1981 from discussions with other lawyers and published case reports, to the extent possible without funding or expert assistance.

ii. F.B.I. Uniform Crime Reports.

The Federal Bureau of Investigation Uniform Crime Reporting Division keeps homicide statistics from the state of Utah, as it does in other states. The F.B.I. Uniform Crime Reports Supplemental Homicide Reports includes information on all homicides known to police in the state of Utah during the subject period, as well as several other variables: the race and sex of the defendant and the victim, whether or not a firearm was used, whether or not the defendant and the victim were related in any way, and whether the homicide was committed under felony circumstances.

Dr. William Bowers, a noted expert in this field, was one of the experts Petitioner would have called in the District Court. As part of his research in this area, Dr. Bowers keeps computer tapes containing the F.B.I. Uniform Crime Reports data, for all states, including Utah, for the period 1976 (when information regarding the defendant was first added to this data base) until 1983. To supplement and update these data, after this Court's decision, I obtained summary reports from the F.B.I. Uniform Crime Reporting Division in Salt Lake City, regarding homicides during the years 1984 through 1985. It was not possible to obtain information which could be subjected to a complete computer analysis for this period, before the Petition for Rehearing was due in this case. However, I asked Dr. Bowers to provide me with a summary of this data, containing the distributions of all cases for the period 1976 to 1983, and a

weighted distribution designed to approximate the figures for the period July 1, 1973 to December 31, 1985. He did so.

iii. Other Information.

After the District Court's Order in June, 1981, I interviewed several witnesses regarding the question of racial prejudice in the community, and surrounding the defendant's trial, and racial prejudice generally in the administration of Utah's homicide sentencing laws. These included criminal defense lawyers and former prosecutors with experience in Utah homicide cases. The evidence I obtained and prepared to present through these latter witnesses included testimony and documents regarding highly aggravated homicide cases in which white defendants received sentences of less than death in the state of Utah under the present statute.

2. The Evidence of Statistical Disparities.

To the extent possible since I obtained this Court's opinion on October 9, 1986, without funds to retain full-time expert assistance, I have endeavored to compile and summarize the statistical evidence of racial disparities in the state of Utah, obtained from these sources in a form which could be included in this proffer. The following tables, showing these racial disparities, have been prepared by me from the information available, and accurately reflect that data to the best of my knowledge and ability.

The disparities shown between black and white defendant cases in these various tables have been analyzed by a qualified

statistical expert, according to the method for determining the statistical significance of such data described in Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN.L.REV. 27, 146 (1984). Disparities marked with an asterisk (*) are statistically significant at the $P \leq .05$ level; disparities marked with two asterisks (**) are statistically significant at the $P \leq .01$ level; disparities marked with three asterisks (***) are statistically significant at the $P \leq .001$ level.

a. The F.B.I. Supplemental Homicide Data.

The following tables summarize comparisons between the total numbers of homicides included in the weighted Uniform Crime Reports Data provided to me by Dr. Bowers, and the individuals that Utah presently holds under death sentence, or has executed since 1973. The tables divide cases according to the race of the victim and the defendant, and show the numerical and ratio disparities between black defendant and white defendant cases, and between black victim and white victim cases, in each row and column.[1]

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[1] This format is derived from tables presented by Professor David Baldus, in Exhibits DB 17, McCleskey v. Kemp, U.S.D.C. D.Ga. No. C-81-2434A.

ALL CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN DEATH SENTENCING RATIOS, ALL WEIGHTED U.C.R. CASES AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.25 (4/20)	0.0 (0/23)	25 points
White Defendant	.01 (4/389)	0.0 (0/4)	1 point
Difference	***24 points	0 points	
Ratio	25 to 1	-	

FEMALE VICTIM

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS IN FEMALE VICTIM CASES: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.60 (3/5)	0 (0/8)	60 points
White Defendant	.01 (1/99)	0 (0/0)	1 point
Difference	***59 points	0 points	
Ratio	60 to 1	-	

USE OF A FIREARM

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS IN CASES INVOLVING FIREARMS: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.33 (3/9)	.0 (0/18)	33 points
White Defendant	.01 (3/222)	.0 (0/3)	1 point
Difference	**32 points	0 points	
Ratio	24 to 1	-	

STRANGER VICTIM

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS IN CASES INVOLVING STRANGER VICTIMS: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.60 (3/5)	.0 (0/2)	60 points
White Defendant	.01 (1/103)	.0 (0/2)	1 point
Difference	***59 points	0 points	
Ratio	60 to 1	-	

FELONY CIRCUMSTANCE

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FELONY CIRCUMSTANCES: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.[2]

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00+ (4/2)	.0 (0/0)	100 points
White Defendant	.05 (4/68)	.0 (0/0)	5 points
Difference	.95+	0	
Ratio	19+ to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING MULTIPLE VICTIMS: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS (see Note 2).

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	100+ (2/0)	.0 (0/0)	100+ points
White Defendant	.15 (3/20)	.0 (0/0)	15 points
Difference	85+ points	0	
Ratio	6+ to 1	-	

2 Apparently because of missing data in the F.B.I. Uniform Crime Reports, and the high frequency of death sentencing among black defendants with white victims, the proportions in several of these tables--those involving felony circumstances, multiple victims, and aggravation levels greater than or equal to 2--exceed 1.00. In these tables, these proportions are expressed as 1.00+. Analyses of statistical significance have not been done on these tables, because of this deficiency in the data.

The following tables control for level of aggravation, according to the scale proposed in Gross & Mauro, Patterns of Death, 37 Stan.L.Rev. 27, 70 (1984).

AGGRAVATION LEVEL 1+

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CONTROLLING FOR U.C.R. AGGRAVATION LEVEL (GREATER THAN OR EQUAL TO 1) AND THE RACE OF THE VICTIM: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.80 (4/5)	.0 (0/2)	80 points
White Defendant	.03 (4/133)	.0 (0/2)	3 points
Difference	***77 points	0 points	
Ratio	26.6 to 1	-	

AGGRAVATION LEVEL 2+

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CONTROLLING FOR THE U.C.R. AGGRAVATION LEVEL (GREATER THAN OR EQUAL TO 2), AND THE RACE OF THE VICTIM: WEIGHTED U.C.R. DATA COMBINED WITH DEATH ROW STATISTICS (see Note 2).

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00+ (3/2)	.0 (0/0)	60 points
White Defendant	.05 (3/56)	-	-
Difference	95+ points	-	
Ratio	12+ to 1	-	

b. The Supplemented Prosecutor's Questionnaire Data.

The following tables have been prepared from data obtained in the questionnaire research done in preparation for the hearing below, supplemented by the additional cases known to counsel. A full list of the cases and the variables summarized here is attached as Exhibit A to this affidavit. Levels of statistical significance have been calculated for these tables in the same manner as described above, and the level of statistical significance so calculated is indicated by asterisks in the same manner as in the preceding tables.

i. All Cases.

ALL CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--ALL CASES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.30 (4/13)	.0 (0/11)	30 points
White Defendant	.02 (4/198)	.0 (0/7)	2 points
Difference	***28 points	0	
Ratio	15 to 1	-	

DEFENDANTS CONVICTED OF MURDER ONLY

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--DEFENDANTS CONVICTED OF MURDER: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (4/6)	0 (0/3)	66 points
White Defendant	.05 (4/91)	0 (0/4)	5 points
Difference	***61 points	0	
Ratio	15 to 1	-	

FIRST DEGREE MURDER CHARGE OR FELONY CIRCUMSTANCE

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING A FIRST DEGREE MURDER CHARGE AND/OR FELONY CIRCUMSTANCE: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.50 (4/8)	0 (0/5)	50 points
White Defendant	.04 (4/103)	0 (0/4)	4 points
Difference	***46 points	0	
Ratio	12.5 to 1	-	

FIRST DEGREE CHARGE AND/OR FELONY CIRCUMSTANCE
AND PRIOR CONVICTION

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES AND DEFENDANTS WITH PRIOR CONVICTIONS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (2/3)	.0 (0/2)	66 points
White Defendant	.06 (3/51)	.0 (0/3)	6 points
Difference	*60 points	0	
Ratio	11 to 1	-	

FIRST DEGREE CHARGE AND/OR FELONY CIRCUMSTANCE
DEFENDANTS UNDER 21

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES, AND DEFENDANTS UNDER 21: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.50 (1/2)	.0 (0/0)	50 points
White Defendant	.00 (0/21)	.0 (0/2)	0 points
Difference	50 points[3]	0	
Ratio	infinite	-	

[3] Statistical significance cannot be computed where one of the cells is empty.

HIGH AGGRAVATION CASES

RACE OF DEFENDANT DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES, RESULTING IN MURDER CONVICTIONS, AND INVOLVING A RISK TO OTHERS OR MULTIPLE VICTIMS, AND APPARENT TORTURE, SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	All Victims[4]
Black Defendant	1.00 (2/2)
White Defendant	.16 (1/6)
Difference	84 points
Ratio	6 to 1

HIGHLY AGGRAVATED CASES WITH MITIGATION

RACE OF DEFENDANT DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES, RESULTING IN MURDER CONVICTIONS, AND INVOLVING A RISK TO OTHERS OR MULTIPLE VICTIMS, AND APPARENT TORTURE, AND DEFENDANT UNDER 21 OR NONTRIGGERMAN: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	All Victims
Black Defendant	1.00 (1/1)
White Defendant	.00 (0/3)
Difference	100 points
Ratio	infinite

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[4] The two tables on this page do not display the empty cells for black victim cases, but include one (white defendant) case where the victim's race is unknown.

ii. First Degree Murder Charges and Murder Convictions.

The following tables consider cases in which first degree murder charges resulted in murder convictions, according to various relevant variables.

ALL CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, ALL CASES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (4/6)	.0 (0/2)	66 points
White Defendant	.05 (4/73)	.0 (0/4)	5 points
Difference	***61 points	0	
Ratio	13 to 1	-	

RISK TO OTHERS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEAIH SENTENCING RATIOS--FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, CASES INVOLVING APPARENT RISK TO OTHERS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/2)	100 points
White Defendant	.08 (2/26)	.0 (0/2)	8 points
Difference	*92 points	0	
Ratio	12.5 to 1	-	

RISK TO OTHERS AND DEFENDANTS WITH PRIORS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--FIRST DEGREE MURDER CASES RESULTING IN MURDER CONVICTIONS, CASES INVOLVING APPARENT RISK TO OTHERS AND DEFENDANT WITH PRIORS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (1/1)	.0 (0/0)	100 points
White Defendant	.15 (2/13)	.0 (0/1)	15 points
Difference	85 points	0	
Ratio	7 to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, MULTIPLE VICTIMS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/1)	100 points
White Defendant	.13 (2/16)	.0 (0/2)	13 points
Difference	*87 points	0	
Ratio	8 to 1	-	

APPARENT TORTURE[5]

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, IN CASES INVOLVING APPARENT TORTURE (y or n): SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (2/3)	.0 (0/0)	66 points
White Defendant	.11 (1/9)	.0 (0/0)	11 points
Difference	55 points	0	
Ratio	6 to 1	-	

MITIGATING FACTORS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--FIRST DEGREE MURDER CASES RESULTING IN MURDER CONVICTIONS, DEFENDANTS UNDER 21 OR NOT THE ACTUAL KILLER: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (1/1)	.0 (0/1)	100 points
White Defendant	.00 (0/37)	.0 (0/3)	0 points
Difference	100 points	0	
Ratio	infinite	-	

5 The number of unknowns in the data on this variable are higher than any other analyzed here.

iii. First Degree Murder Convictions.

The following tables have been compiled considering only first degree murder convictions.

ALL FIRST DEGREE CONVICTIONS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, IN CASES INVOLVING FIRST DEGREE MURDER CONVICTIONS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.80 (4/5)	.0 (0/0)	80 points
White Defendant	.11 (4/35)	.0 (0/1)	11 points
Difference	**69 points	0	
Ratio	7 to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING FIRST DEGREE MURDER CONVICTIONS AND MULTIPLE VICTIMS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/0)	100 points
White Defendant	.20 (2/10)	.0 (0/1)	20 points
Difference	80 points	0	
Ratio	5 to 1	-	

DANGER TO OTHERS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING APPARENT DANGER TO OTHERS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/0)	100 points
White Defendant	.20 (2/10)	.0 (0/1)	20 points
Difference	80 points	0	
Ratio	5 to 1	-	

APPARENT TORTURE CIRCUMSTANCES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING FIRST DEGREE MURDER CONVICTIONS AND APPARENT TORTURE (see Note 5 above): SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/0)	100 points
White Defendant	.25 (1/4)	.0 (0/0)	0 points
Difference	75 points	0	
Ratio	4 to 1	-	

iv. Reversed Death Sentences.

In all the above tables, only death sentences carried out or presently in force have been included. Cases involving legally erroneous death sentences have not been considered as comparable. The addition of those cases in which death sentences have been imposed and later reversed by the Utah courts for legal error appears to reduce the disparities only slightly, and in most categories does not affect statistical significance.

ALL FIRST DEGREE CHARGES AND FELONY CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, IN CASES INVOLVING FIRST DEGREE MURDER CHARGES OR FELONY CIRCUMSTANCES, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.50 (4/8)	.0 (0/5)	50 points
White Defendant	.09 (9/103)	.0 (0/4)	9 points
Difference	**41 points	0	
Ratio	5.5 to 1	-	

FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTION

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FIRST DEGREE MURDER CASES RESULTING IN MURDER CONVICTIONS, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (4/6)	.0 (0/2)	66 points
White Defendant	.12 (9/73)	.0 (0/4)	12 points
Difference	**54 points	0	
Ratio	5.5 to 1	-	

FIRST DEGREE MURDER CONVICTIONS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FIRST DEGREE MURDER CONVICTIONS, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.80 (4/5)	.0 (0/0)	80 points
White Defendant	.26 (9/35)	.0 (0/1)	26 points
Difference	*54 points	0	
Ratio	3 to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FIRST DEGREE MURDER CONVICTIONS INVOLVING MULTIPLE VICTIMS, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/2)	100 points
White Defendant	.30 (3/10)	.0 (0/1)	30 points
Difference	70 points	0	
Ratio	3.3 to 1	-	

4. The Impact of Racial Factors on William Andrews' Case.

In response to the Court's opinion, I sought out and compiled evidence from two sources, by which to measure the level of aggravation in William Andrews' case and determine whether the impact of any racial discrimination in Utah capital sentencing on his case is likely. They are measures of aggravation level developed in studies in other jurisdictions; and comparative Utah homicide cases where no death sentence was imposed on white defendants.

a. The Level of Aggravation of William Andrews' Case According to Aggravation Scales Developed In Other States.

After receiving the Court's opinion, I contacted Professor David Baldus of the University of Iowa Law School, who conducted the study of Georgia capital sentencing referred to by the Court in the McCleskey case. I asked Professor Baldus to calculate the level of aggravation in William Andrews' case, on the same aggravation scale as he did Warren McCleskey's, in the testimony referred to in the Eleventh Circuit opinion. Professor Baldus did so, and informed me that based on that calculation the level of aggravation of William Andrews' case was .39. As I understand it, this calculation reflected the fact that the crime was highly aggravated on several measures (torture of the victims, contemporaneous felonies, and execution-style killings), but the aggravation score was considerably reduced by the fact that the defendant did not personally kill and was not of comparable culpability to his co-perpetrators. A copy of Prof. Baldus'

handwritten notes making these calculations, and the computer program on which they were based, both of which he sent to me at my request, are attached as Exhibit B.

According to Professor Baldus, this score placed William Andrews' case at the seventh level of the aggravation scale he testified on in the McCleskey case. A copy of the exhibit from the McCleskey case setting out racial disparities in death sentencing rates on that scale, from Professor Baldus' research in Georgia, is included in Exhibit B.[6] At Level 7, that Exhibit shows arithmetic discrepancies of 25 points among white victim cases, based on the race of the defendant; and 25 to 39 points, based on the race of the victim, in black defendant cases and in white defendant cases, respectively. Ibid. That table further shows that, it is only at the eighth and highest aggravation level that the racial disparities Professor Baldus found in Georgia disappear.

Professor Baldus also referred me to the work of Professor Arnold Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.CAL.DAV.L.REV. 1327 (1985), for another method of measuring aggravation levels in capital cases. Professor Barnett's data distributes Georgia homicide cases according to three variables: the certainty the defendant is a deliberate killer; the status of the victim; and the heinousness of the killing. See 18 U.C.DAV.L.REV. 1364-1366. Under Prof. Barnett's

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6 This table is also reprinted in McCleskey v. Kemp, 753 F.2d at 922 (Clark, J., dissenting).

scale, it appears that William Andrews' case falls into the category (0, 1, 2). He rates a 0 on the first category, because "it seems clear that the defendant neither ordered the killing nor was the triggerman" and "there is reason to doubt that the defendant's actions in themselves would have caused the victim's death (e.g., (i) the defendant beat the victim, but it was a co-perpetrator's stabbing that killed him...." 18 U.CAL.DAV.L.REV. 1364. It rates a 1 on the defenseless status of the victim, because this was a "stranger to stranger killing...." Id. at 1365. It rates a 2 on the "heinous" scale because "there were at least two homicide victims," "the killing was execution style," and "the physical details of the killing are unusually repulsive...." Id. at 1366. This makes William Andrews' case a "category 3" homicide within Professor Barnett's research, the category in which the greatest disparities based on race were found in Georgia. See id. at 18 U.CAL.DAV.L.REV. 1347-1353.

b. Comparably Aggravated Utah Homicide Cases Where No Death Sentence Was Imposed on White Defendants.

Among the witnesses I would have called at an evidentiary hearing in District Court were experienced criminal lawyers, who could have testified about their knowledge of the Utah criminal justice system, the manner in which serious murder cases are routinely disposed of in the Utah state courts, and the facts of particular aggravated homicide cases involving white defendants in which no death sentence was imposed. Based on my interviews of these individuals, and review of available records, I believe their testimony would have included the following facts regarding

cases where white defendants received prison sentences for highly aggravated murders under the present Utah law:[7]

1. Mark Chandler Austin, convicted in Utah County of cutting his wife's throat, then cutting open her abdomen and removing her unborn child and stabbing it to death. Mr. Austin was permitted to plead to second degree murder and sentenced to prison.

2. Robert Belcher, a prisoner of the Utah State Prison in the Maximum Security Unit, convicted in Salt Lake County in 1978 of killing another inmate by stabbing him 157 times. Mr. Belcher pled guilty to second degree murder.

3. John Michael Calhoun, convicted in Salt Lake City of killing two people during the course of a burglary, in execution style, after tying them up and holding them hostage. (The Utah Attorney General at the time, Robert Hanson, publicly stated that neither Mr. Calhoun nor his co-defendant were appropriate candidates for the death penalty because of their young age; Mr. Calhoun was eighteen, one year younger than Petitioner at the time of this crime. See Reply Brief of Petitioner, Andrews v. Morris, Utah Sup. Ct. No. 18230, p.9.)

4. Joseph Paul Franklin, convicted in Salt Lake County in 1981 of the race-motivated sniper killing of two young black men. Mr. Franklin had a long history of violent, race-motivated attacks on black people. Mr. Franklin was convicted of first degree murder, but given a life sentence by a jury.

5. Steven Kaniewski, convicted in Salt Lake County of first degree murder for shooting a man who had picked him up while hitchhiking, dragging him behind a vehicle, and running over him several times. Mr. Kaniewski was convicted of first degree murder but given a life sentence by a judge.

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7 Some of these cases were among those on which Petitioner submitted affidavits in state court, and requested a hearing. See Petitioner's Brief, Andrews v. Morris, No. 18230 at 13. Others are more recent, and have been compiled during the course of this appeal, and since this Court's opinion.

6. Douglas Edward Kay and Norman Newstead, convicted of three counts of capital homicide and four counts of aggravated robbery, all arising out of the execution-style killing of three persons during a robbery in Cedar City in 1984. Mr. Newstead was convicted of three counts of capital homicide and other crimes and given a life sentence by a Salt Lake Judge. Mr. Kay was permitted to plead guilty in exchange for a life sentence; the prosecution initially withdrew the plea agreement, which resulted in an appeal to the Utah Supreme Court, State v. Kay, 717 P.2d 1294 (Utah 1986). After that appeal, although the state court had approved the withdrawal of the guilty plea, the prosecution elected to go forward with the plea bargain, and Mr. Kay received a life sentence.

7. Dan Lafferty was convicted of two counts of murder in Utah County in 1984, committed during a burglary. Although the killings were brutal, and one of the victims was a child, Mr. Lafferty was given a life sentence by a jury.

8. Heber Norton, convicted in Carbon County in 1981 of two counts of first degree murder during a bank robbery. Mr. Norton had a long criminal record. He was initially sentenced to death, but his death sentence was reversed (because of an instruction identical to that given the jury in Petitioner's case). State v. Norton, 675 P.2d 577 (Utah 1983). On remand, he was sentenced to life imprisonment.

9. Robert Phillips, convicted in 1980 of first degree murder during a robbery in which the victim was killed execution-style. Mr. Phillips had a prior record, but he was sentenced to life in prison by a Salt Lake County judge.

10. Scott Reed was charged in Salt Lake County of one count of first degree murder, for bludgeoning to death an elderly woman during a burglary. Mr. Reed pled guilty to second degree murder and was given a life sentence as part of a plea bargain.

11. John Madison Raines, who was found guilty of first degree murder during the course of a robbery in Salt Lake County. Mr. Raines had a long record of criminal convictions, and was an escapee at the time of the murder, which occurred during the robbery of a drug store. He was convicted of first degree murder, but sentenced to life by a jury.

12. John H. Taylor, convicted in Salt Lake County in 1974 of killing three people after an argument at a restaurant in Salt Lake City. Mr. Taylor was white; at least two of his three victims were black. The jury convicted him of second degree murder and he was sentenced to prison.

13. Julio Valdez, convicted of two counts of capital murder in Salt Lake County in 1983. Mr. Valdez killed the 17 year old mother of his child, and then drowned his 10 month old child. He received a life sentence from a jury.

14. Douglas Yoakum, convicted in Salt Lake County in 1977 of one count of attempted rape and first degree murder. Mr. Yoakum was interrupted during a sexual attack on a young woman by the 68 year old murder victim. Mr. Yoakum proceeded to shoot both the victim, and the young woman; the young woman survived. Mr. Yoakum was convicted of first degree murder, but given a life sentence by a Salt Lake County Judge.

c. Other Utah Death Sentences In Force.

There are two other black men on death row in Utah, Elroy Tillman and Douglas Carter. Both were convicted of single victim felony murders, committed in the course of a burglary.

All three white defendants now on Utah's death row--Don Lafferty, Douglas Bishop, and Ronald Gardner--have been convicted of multiple murders. So was Gary Gilmore, the one man Utah has executed since 1972.

The various relevant aspects of these individuals' cases, to the extent I have been able to learn them, are summarized in the Supplemented Prosecutor's Questionnaire Data (Exhibit A) and on the tables set out above.

CONCLUSION

The information set out above has been compiled under extreme time pressures, in order to present it together with a Petition for Rehearing in this case. It has not been possible to fully confirm, cross-check, and insure the accuracy of all this data and information in the time allowed. Nor has there been time to gather complete, updated information in all these categories. There certainly are numerous cases involving white defendants who have not received the death sentence which are not included in the summaries above.

Although I have no formal training in social science research, I have endeavored to prepare and present the information set out above in a manner consistent with the studies that have been done by social science experts in this area in other states, to the extent I understand them. I have, throughout, consulted with experts who were willing to advise me without payment or formal retainer. The facts set out here are correct to the best of my knowledge and ability to summarize them, and I believe they could be established at any evidentiary hearing on this question the Court allows.

Timothy K. Ford

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1986.

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

EXHIBIT A

SUMMARY LIST OF SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA

EXHIBIT A - KEY

The following list contains the data derived from the Supplemented Prosecutor's Questionnaires which has been utilized to construct the tables set out in this affidavit. It shows:

1) The defendant's name

2) The charge (1 = first degree murder; 2 = second degree murder; 3 = lesser crime; 9 equals unknown)

3) Conviction (0 = acquittal; 1 = first degree murder; 2 = second degree murder; 3 = less; 9 = unknown)

4) Defendant's race (W = white; B = black; O = other; / = unknown)

5) The defendant's age: 99 = unknown

6) The defendant's prior record: PRO = property crime; PER = crime against person; PRI = imprisonment for unknown offense; NO = none; / = unknown

7) Victim's race: W = white; B = black; O = other; / = unknown

8) Number of victims

9) Torture circumstances: Y = yes; N = no; M = suggested; / = unknown

10) Felony circumstances: Y = yes; N = no; M = suggested; / = unknown

11) Psychiatric mitigation: Y = yes; N = no; M = suggested; / = unknown

12) Risk to others: Y = yes; N = no; M = suggested; / = unknown

13) The defendant was the actual killer (trig): Y = yes; N = no; M = suggested; / = unknown

14) Sentence: D = death sentence in effect; R = death sentence reversed; blank = other

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
aarvald	9	0	w	99	/	w	1	/	/	/	/	/	
abeyta	1	2	w	16	/	w	1	m	y	n	n	n	
adams	1	2	/	99	/	w	1	/	/	/	/	/	
alexander	1	2	w	15	pro	w	1	n	y	n	n	y	
allen	1	2	w	17	pro	b	1	n	n	y	n	n	
alvardo	1	0	w	31	per	w	1	n	n	y	n	n	
alvarez	2	2	w	24	pro	/	1	y	n	n	y	n	
andreason	1	2	w	20	/	w	2	n	y	n	n	y	
andreini	1	0	w	35	/	w	1	/	/	/	/	/	
andrews	1	1	b	19	pro	w	3	y	y	n	y	n	d
andrus	2	9	w	56	per	w	1	/	/	/	/	/	
arnold	1	2	w	28	no	w	2	n	n	n	y	y	
austin	2	3	w	20	per	w	1	n	n	n	n	n	
austin	1	2	w	18	no	w	2	/	/	/	y	y	
avila	2	3	w	20	no	w	1	n	n	n	n	y	
azelia	2	3	w	25	/	w	1	n	n	n	n	n	
baker,d	2	3	w	51	/	w	1	/	n	n	n	y	
baker,p	2	3	w	53	/	w	1	/	n	n	n	n	
balderas	1	2	w	55	pro	w	1	n	n	n	y	/	
baldwin	2	3	w	36	no	w	1	n	n	n	n	n	
barcelon	2	0	w	24	per	w	1	n	n	n	n	n	
beck	1	2	w	22	pro	w	1	n	n	n	n	n	
belcher	1	2	w	46	/	w	1	/	n	n	n	n	
beverleigh	1	0	w	35	pri	w	1	/	y	/	/	/	
billington	2	2	w	50	/	w	1	/	/	/	/	/	
bindrup	2	9	w	24	/	w	1	n	n	[illegible]	[illegible]	n	
bishop	1	1	w	30	/	w	5	/	[illegible]	v	n	y	d
blackbeau	2	3	o	34	/	w	1	n	[illegible]	[illegible]	n	n	
boatright	2	3	w	31	/	w	1	n	[illegible]	[illegible]	y	n	
bolsinger	2	2	w	22	/	w	1	n	y	n	n	n	
boren	2	3	w	23	no	w	1	n	n	n	n	n	
bradford	2	3	b	27	per	b	1	/	/	/	/	/	
bradley	1	2	w	23	/	w	1	n	n	n	n	n	
bramwell	2	0	w	44	no	w	1	n	n	n	y	n	
brewer	1	2	w	23	/	w	2	n	y	n	n	y	
brooks	1	2	w	22	/	w	1	n	y	/	n	y	
brown	2	3	w	18	pro	w	1	/	/	y	/	/	
brown,g	1	1	w	37	/	w	1	n	/	n	n	y	
brown,j	1	1	w	25	per	w	2	n	y	n	y	y	r
brown,l	2	3	w	68	/	w	1	n	n	y	n	n	
butler	2	3	w	35	/	w	1	/	/	/	/	/	
butterfiel	9	9	/	99	/	o	1	n	n	y	/	n	
caffal	1	2	w	18	/	w	1	n	n	n	y	n	
calhoun	1	1	w	18	/	w	2	n	y	n	n	y	
carpenter	1	0	b	18	no	w	1	n	n	n	n	y	
carter	1	1	b	30	/	w	1	n	y	n	n	y	d
chavez,j.	2	3	w	43	/	w	1	n	n	n	n	n	
chavez,r	2	0	w	99	/	/	1	y	n	n	n	/	
chester	2	3	w	62	/	w	1	n	n	y	n	n	
chidester	3	9	/	99	/	w	1	/	/	/	/	/	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
christian	1	9	w	23	pri	w	1	/	/	/	/	/	
christophe	2	0	w	26	no	w	4	n	y	y	y	n	
clayton	9	9	/	99	/	/	1	/	/	/	/	/	
codianna	1	1	w	21	no	w	1	n	y	n	n	y	r
coleman	1	3	b	29	per	b	1	n	y	y	/	/	
collier	1	2	w	38	pro	w	1	n	n	n	n	y	
coney	2	3	b	18	no	b	1	n	n	y	n	y	
cooper	3	3	w	22	/	w	1	/	/	/	/	/	
coy	1	0	w	31	per	w	1	/	/	/	/	/	
craig	2	2	w	45	pro	w	2	n	y	y	y	n	
crane	2	3	w	25	no	w	1	n	n	y	n	n	
crossdale	1	9	w	30	pro	w	1	n	y	y	n	n	
davidson	2	3	w	44	/	w	1	n	n	y	n	y	
defde	2	2	b	19	per	b	1	n	n	n	n	y	
dehart	2	3	/	29	no	w	1	/	n	n	n	/	
deifert	1	2	w	40	/	/	1	/	/	/	/	/	
dends	2	2	w	21	no	w	1	n	n	y	n	n	
dixon	9	9	/	99	/	w	1	/	/	/	/	/	
dodge	2	3	w	23	/	w	1	/	/	/	/	/	
douglas	2	3	w	33	per	/	1	n	n	y	n	n	
downey	3	3	w	25	/	w	1	/	n	y	n	n	
dronzank	2	2	w	47	/	/	1	n	y	n	n	n	
druan	2	2	w	99	/	w	1	/	/	/	/	/	
dunn	1	2	w	30	per	w	1	n	y	n	n	n	
dunsdon	1	1	w	30	pro	w	1	n	y	n	n	y	r
dupre	2	3	w	48	no	w	1	/	/	y	/	/	
duran	1	2	w	18	per	b	1	n	n	n	/	/	
earl	1	0	w	25	/	w	2	n	n	n	y	n	
eastwood	1	2	w	30	/	w	1	/	y	/	/	n	
eldridge	1	2	w	26	pro	w	1	n	n	n	y	n	
eloylopes	9	9	w	36	/	w	1	/	/	/	/	/	
ervin	2	3	b	24	ro	w	1	n	n	n	n	n	
evanson	1	2	w	20	pro	w	1	n	n	y	n	n	
faingaanak	2	0	o	29	no	o	1	n	n	/	y	/	
farrow	2	3	b	49	/	b	1	n	n	n	n	n	
felsen	3	3	w	21	no	w	1	n	/	n	/	n	
fontana	2	2	w	28	per	w	1	n	n	n	n	n	
fontayne	1	0	b	32	/	b	1	/	/	y	/	/	
foote	2	3	w	35	/	w	1	/	/	/	/	/	
franklin	1	1	w	27	per	b	2	n	n	n	y	y	
galegas	2	3	w	30	no	w	1	n	n	y	n	n	
galego,l	2	3	w	40	no	w	1	n	n	n	n	n	
gardner	1	1	w	22	per	w	1	n	y	/	y	y	d
gardunio	1	2	w	25	/	w	1	/	/	/	/	/	
gaxiola	1	2	w	35	pro	w	1	m	y	m	y	m	
gibson	2	3	w	60	no	b	1	n	n	n	m	n	
gibson	2	2	w	28	/	w	1	/	/	/	/	/	
gilmore	1	1	w	35	per	w	1	n	y	n	y	y	d
gonzales	2	2	w	38	per	i	1	n	n	y	n	y	
gorman	2	3	w	42	per	w	1	/	y	/	/	/	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN	
goss	2	3	w	54	per	o	1	/	/	y	n	n		
graves	1	9	/	99	/	/	1	/	/	/	/	/		
griggs	1	0	w	70	no	w	1	n	/	/	/	/		
grueber	2	3	w	18	/	w	1	/	/	/	/	/		
gurule,t	1	2	w	28	pri	w	1	/	/	/	/	/		
hales	2	3	w	28	per	w	1	/	/	/	/	/		
hallet	3	3	w	19	no	w	1	n	n	n	/	n		
hansen	2	3	w	23	/	w	1	/	/	/	/	/		
harding	1	2	w	44	/	w	1	y	y	n	n	n		
hardy	1	1	w	28	per	w	1	n	y	y	n	y		
harris	2	3	b	25	no	w	1	n	n	n	n	n		
hayes	3	3	w	27	per	w	1	n	/	y	/	n		
henderson	2	2	w	18	per	w	1	/	y	n	/	n		
henline	2	9	/	25	pro	w	1	/	/	/	/	/		
hernandez	2	9	w	99	/	/	1	/	/	/	/	/		
howard	1	2	w	20	no	w	2	n	n	n	n	n		
howell	2	3	w	32	per	w	1	n	n	n	y	y		
huntley	1	2	w	28	pro	w	1	n	y	n	n	y		
huston	1	2	w	27	pro	w	1	n	y	y	/	/		
jarvis	2	9	w	26	/	w	1	/	/	/	/	/		
jewell	2	9	b	35	/	b	1	/	/	/	/	/		
johann	1	2	w	30	/	w	1	/	/	/	/	/		
johnson	1	2	b	27	no	b	1	n	n	n	y	y		
johnson	2	9	w	28	/	w	1	/	/	/	/	/		
johnson	3	3	w	29	/	w	1	n	n	y	n	n		
kanieuski	1	1	w	22	no	w	1	n	y	y	y	y		
kay,d	1	1	w	99	/	w	3	/	y	n	y	y		
kelly	1	1	b	99	no	w	1	n	y	n	n	y		
ketterer	2	3	w	25	/	w	1	/	/	/	/	/		
kichol	2	3	o	20	pro	o	1	/	/	/	/	/		
kingston	3	0	w	54	no	w	1	n	n	/	/	/		
lafferty	1	1	w	43	per	w	2	y	y	y	n	y		d
laffertyda	1	1	w	99	/	w	2	y	y	y	n	n		
lancaster	1	2	w	33	per	w	1	/	y	n	n	n		
lebaron	1	1	w	54	per	w	1	n	n	n	y	n		
lee	2	9	/	99	/	/	1	/	/	/	/	/		
leonard	2	3	b	32	/	b	1	/	/	/	/	/		
lester	2	3	w	29	/	/	1	/	/	/	/	/		
levgas	1	0	w	28	/	w	1	/	/	/	/	/		
lind	2	9	o	25	/	o	1	n	n	/	y	/		
lindquist	2	0	w	38	/	w	1	/	/	/	/	/		
lindsey	3	0	/	99	/	w	1	/	/	/	/	/		
lindstrom	2	3	w	35	/	w	1	/	/	/	/	/		
lopez	2	2	w	99	/	/	1	y	/	/	/	y		
losh	2	9	/	12	no	w	5	n	/	/	/	/		
maestas	1	2	w	28	per	w	1	n	n	n	n	y		
malek	2	3	w	23	/	w	1	/	/	n	/	y		
manuel	2	3	b	45	per	w	1	n	n	n	n	y		
marsden	2	3	w	36	/	w	1	n	n	/	/	n		
marston	1	0	w	22	/	w	1	/	/	/	/	/		

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
martinez	2	0	w	26	no	o	1	n	y	n	y	y	
martinez	1	2	w	27	/	w	1	n	y	y	n	y	
marvel	1	1	w	25	pro	w	1	n	y	n	n	y	r
massburg	2	3	w	19	/	w	1	n	n	y	n	n	
matelau	2	3	o	29	no	o	1	n	n	n	y	n	
maxley	2	3	w	24	per	w	1	/	/	y	/	n	
miller	1	1	w	15	no	w	1	/	y	n	m	y	
minnish	2	9	w	37	/	w	1	/	/	/	/	/	
minter	2	3	w	49	no	w	1	n	n	n	n	n	
mitchell	1	1	w	99	/	w	1	n	y	/	n	y	
mitcheson	2	2	w	99	/	w	1	/	/	/	/	/	
monroya	2	3	/	23	per	w	1	/	/	/	/	/	
morales	2	2	w	26	/	w	1	n	n	n	/	y	
morefield	2	3	w	27	no	w	1	/	/	/	/	/	
mouritsen	2	3	w	18	pro	w	1	n	n	/	/	n	
namds	2	0	w	33	/	w	1	/	/	/	/	/	
nash	1	2	w	65	per	w	1	n	h	h	n	n	
nelson	1	1	w	99	per	w	1	y	y	/	n	y	
newstead	1	1	w	99	per	w	3	/	y	/	/	y	
nicholson	2	2	w	21	/	w	1	n	n	n	n	n	
nisonger	1	0	w	35	per	w	1	/	y	/	/	/	
nordgren	2	3	w	35	pro	w	1	/	/	/	/	/	
northern	1	1	w	17	pro	w	1	n	y	n	n	n	
norton	1	1	w	72	per	w	2	n	y	y	n	y	
pastillas	2	2	w	31	/	w	1	n	n	n	y	y	
payne	2	2	w	26	pro	w	1	/	/	/	/	/	
pendleton	2	3	b	54	/	w	1	n	n	n	n	n	
penzari	9	0	w	23	no	w	1	n	n	/	/	/	
perez	1	1	w	16	pro	w	1	n	y	n	n	n	
perryman	2	3	w	67	pro	/	1	/	/	/	/	/	
petree	1	2	w	15	pro	w	1	n	m	n	n	y	
phillips	1	1	w	26	pro	w	1	n	y	n	n	y	
pierre	1	1	b	21	no	w	3	y	y	n	y	y	d
pikwait	2	9	o	24	/	o	1	/	/	/	/	/	
pikyairt	2	9	o	25	/	o	1	/	/	/	/	/	
potter	1	9	w	18	/	w	1	m	n	n	n	y	
proud	1	9	w	29	pro	w	1	/	n	n	/	/	
pugh	1	9	b	27	pro	b	1	/	/	/	/	/	
rackhaun	2	0	w	39	no	w	1	/	/	/	/	/	
rainer	1	1	w	30	per	w	1	n	y	n	n	y	
redford	2	3	w	56	/	w	1	n	n	y	y	y	
reed,s	1	1	w	99	/	/	1	/	y	y	/	y	
renteria	1	0	w	25	/	w	1	n	n	n	y	/	
reyna	2	3	w	37	per	w	1	n	n	y	n	n	
richardson	2	3	w	25	/	w	1	n	/	/	n	/	
ried	1	2	w	28	/	w	1	m	n	n	y	n	
roberts	1	3	b	99	no	w	3	y	y	n	y	n	
rodriguez	1	9	w	22	pri	w	1	/	/	/	/	/	
rogers	9	9	w	77	no	w	1	/	/	/	/	/	
rogers	2	3	w	60	/	w	1	/	/	/	n	/	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
romero	2	3	w	34	pro	w	1	/	/	/	y	/	
roseland	1	0	w	25	/	w	2	n	n	n	y	n	
rucetta	2	3	w	46	no	w	1	/	/	y	y	n	
ruch	3	3	w	17	/	w	1	n	y	n	m	n	
russel	1	9	w	35	no	/	2	m	n	y	m	n	
sanchez,c	1	2	w	30	per	w	1	n	n	n	y	/	
sanchez,k	1	2	w	18	/	w	1	/	/	/	/	/	
santaw	2	9	/	34	/	/	1	/	/	/	/	/	
schoenfiel	2	3	w	20	/	w	1	n	y	m	m	y	
schreuderf	1	1	w	50	no	w	1	n	n	n	n	n	
schreuderm	1	2	w	19	no	w	1	n	n	y	n	y	
schuman	2	2	w	25	/	w	1	/	/	/	/	/	
schwartz	2	3	/	99	/	/	1	/	/	/	/	/	
scott,h	1	2	b	31	per	w	1	m	y	n	n	y	
scott,s	1	2	b	29	/	b	2	n	y	y	m	/	
sensarnie	2	3	w	39	/	w	1	/	y	/	y	y	
sessions	2	3	w	24	pro	w	1	n	n	/	n	/	
shaffer,d	1	1	w	99	pro	w	1	/	y	/	/	y	
sharmberg	2	9	w	29	/	w	1	/	/	/	/	/	
shuffield	1	2	w	22	per	w	1	/	/	/	m	y	
siebert	2	3	w	24	/	w	1	/	/	y	/	n	
simmons	2	3	w	34	/	w	1	n	n	n	n	n	
snack	2	3	w	24	no	w	1	/	/	/	/	/	
smith	1	9	w	30	per	w	1	n	n	n	n	n	
smith	1	1	w	40	/	w	1	/	y	/	m	y	
smith,r	2	2	/	99	/	w	1	/	/	/	/	/	
snow	2	3	o	23	pro	w	1	m	n	m	/	y	
st.julian	2	0	w	22	/	b	1	n	n	/	n	/	
stack	1	1	w	18	pro	w	1	n	n	n	n	y	
stadat	2	0	o	35	/	w	1	/	/	/	/	/	
starkey,g	2	3	/	35	/	w	1	/	/	y	/	/	
starks	3	3	w	25	/	w	1	/	/	/	/	/	
starky,s	2	3	w	22	/	w	1	/	/	/	/	/	
stewart	2	3	w	24	/	w	1	/	/	/	/	/	
strandrod	1	1	w	27	pro	w	2	n	n	n	y	y	
strom	2	0	w	32	no	w	1	/	/	/	/	/	
summarell	1	2	w	21	pri	w	1	/	y	/	y	y	
taiese	2	3	o	27	/	o	1	n	n	n	y	n	
tanner	2	3	w	25	/	w	1	/	/	/	/	/	
taylor	1	2	w	99	/	b	3	n	y	y	y	n	
tena	2	2	w	99	/	w	1	/	/	/	/	/	
thomas	2	3	/	99	/	/	1	/	/	/	/	/	
thomas	2	9	w	56	no	w	1	/	/	/	/	/	
tillman	1	1	b	46	pri	w	1	n	y	n	n	y	d
toledo	2	3	/	20	/	w	1	n	n	n	n	n	
torres	2	0	w	23	pro	w	1	/	/	/	/	/	
torres,i	2	3	w	26	/	w	1	n	n	n	n	n	
trujillo	2	3	w	27	/	w	1	n	n	y	n	y	
tuttle	1	1	w	99	/	w	1	/	y	n	n	y	
uribe	2	3	w	37	no	w	1	n	n	y	n	n	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
vaenuku	9	3	o	32	no	o	1	n	n	y	m	n	
valdez	2	3	w	36	no	b	1	n	n	n	n	n	
valdez,j	1	1	w	99	/	w	2	/	/	/	n	y	
vigil,a	2	3	w	23	/	w	1	/	/	/	/	/	
vigil,b	2	3	w	31	/	w	1	n	n	m	n	y	
vigil,r	2	3	w	22	pro	w	1	n	n	y	n	y	
walker,t	1	1	w	99	/	w	1	n	y	n	y	y	
wallace,l	2	2	w	33	/	w	1	/	/	/	/	/	
wallace,r	2	3	w	99	/	/	1	n	n	n	n	n	
ward	1	2	w	33	/	w	1	n	y	n	/	/	
wardle	2	2	w	50	/	w	1	n	n	m	n	n	
warner	1	2	w	22	no	w	1	n	y	/	n	n	
washburn,c	1	9	w	23	no	w	1	/	y	/	/	/	
washburn,c	1	9	w	20	per	w	1	/	y	/	/	/	
wauneka	2	3	o	36	per	o	1	m	n	y	n	n	
webb	1	2	w	16	no	w	2	n	y	n	n	y	
wellwood	1	9	w	30	pri	w	1	/	/	/	/	/	
whatley	2	3	b	37	/	w	1	/	/	y	/	/	
white	3	0	w	35	/	w	1	/	/	y	/	y	
white	1	9	w	27	/	w	1	/	n	n	/	/	
williams	1	2	/	25	/	w	1	n	y	n	n	n	
wilson	2	2	w	65	/	w	1	/	/	/	/	/	
wood	1	1	w	38	no	w	1	n	y	/	n	y	r
wulfenstei	1	0	w	21	per	w	1	/	/	/	/	y	
yoakum	1	1	w	27	no	w	1	y	y	y	y	y	

EXHIBIT B

NOTES OF PROF. DAVID BALDUS CALCULATING
AGGRAVATION LEVEL IN WILLIAM ANDREWS' CASE
AND COMPUTER PROGRAM ON WHICH NOTES WERE BASED

1) Bobbitt vs Camp — Andrews under DPMR10X3 (t=.39)
HISOIDX2 (7)
↳ which includes DB90+91

NO Conduct	—	Impeus Mutco Capacity
No Kell	-.07	
Recc Mat	—	
Averse	—	
Inarrat	—	
Kidnap	—	
Tortius	Yes .24	
D.P. Sec		
DTBTEXP	(5X.03) .15	→ B2, B3, B4 + 2 B7 factors
⇒ AGGFCX	(2X.03) .06	— Tortius + Execution Style Killing
⇒ MANAGGFCX	—	
Immodest	—	
⇒ CPLESSFN LOF???	(.08)	
DEFARMIT	—	
Extended	(1X.01) .01	
Total	.39	→ .38 → .39 → level 7 of DB90

IDwitness ✓(present)
Pretrial ID
Confess
CO Stat
Med Repat
Tortius re prep

Copop

Not included
Aggravat
of comparable
culpability

```
: LDP      TASK     B   S.U. ACADEMIC COMPUTING CENTER VM/SP

SE IF .465 =< DTHSNIDA < .49 THEN HI500JRX = 2 ;
SE IF .49 =< DTHSNIDA < .54 THEN HI500JRX = 3 ;
SE IF .54 =< DTHSNIDA < .60 THEN HI500JRX = 4 ;
SE IF .60 =< DTHSNIDA < .69 THEN HI500JRX = 5 ;
SE IF .69 =< DTHSNIDA < .79 THEN HI500JRX = 6 ;
SE IF .79 =< DTHSNIDA < .96 THEN HI500JRX = 7 ;
SE IF DTHSNIDA >= .96 THEN HI500JRX = 8 ;
' ;
IDX3 = NOCONDUC * -.46 + NOKILL * -.07 + RACEMOT * .08 +
VENGE * .48 + INSMOT * .14 + KIDNAP * .16 + TORTURE * .24 +
PLEAS * .23 + LDFB7EXP * .03 + MAJAGFCX * .03 + MINAGFCX * .01 +
INSANDEF * .12 + CPLESSEN * -.08 + DEFADMIT * -.07 + EVIDINDX * .01 ;
PMRIDX3 < .15 THEN HI5OIDX2 = 0 ;
SE IF .15=<DPMRIDX3 < .16 THEN HI5OIDX2 = 1 ;
LSE IF .16 =< DPMRIDX3 < .17 THEN HI5OIDX2 = 2 ;
SE IF .17 =< DPMRIDX3 < .20 THEN HI5OIDX2 = 3 ;
SE IF .20 =< DPMRIDX3 < .23 THEN HI5OIDX2 = 4 ;
LSE IF .23 =< DPMRIDX3 < .27 THEN HI5OIDX2 = 5 ;
LSE IF .27 =< DPMRIDX3 < .33 THEN HI5OIDX2 = 6 ;
LSE IF .33 =< DPMRIDX3 < .44 THEN HI5OIDX2 = 7 ;
LSE IF DPMRIDX3 >= .44 THEN HI5OIDX2 = 8 ;
ND ;
MRIDY=DPMURIDT ;
:PMURIDY = 1 & LDF44 ~= 1 THEN DPMURIDY = 0 ;
AL DTHSNIDA=DTH SNT AT PEN TR INDEX AGE/MIT EV FT AL
UIDX2=TOP 500 CASES REV DPMURIDT IDX
  DPMRIDX3=DP IF INDICT INDEX EVID FACT
   DSNIDXLA=INDEX FOR DEATHSNT/LOG REGRESS ALL
   HI500LGX=SCALE OF TOP 500 CASES ON DPMIDXL3
   HI500JLGX=SCALE OF TOP 500 CASES ON DSNIDXLA
   HI500JRX=SCALE OF TOP 500 CASES ON DTHSNIDA
  DPMURIDY=RECODED DPMURIDT WITH LDF44;
IDXLM = -2.950 + (-.887)*BLVICMOD + (-1.569)*MITDFFN + (1.33)*RESBKIN
-1.432)*SMUNDRIG + (.889)*LDFESUM + (.588)*MAJAGFCX
-1.340)*JOINTKIL + (-2.313)*VBLUSKL + (.974)*STRANGER
.261)*EVIDINDX + (1.963)*DEADFACT;
RIDM = -.12 + (.10)*LDFB4 + (-.27)*SMUNDRIG + (.10)*LDFESUM + (.11)*BEAT
     + (.13)*MULSTAB + (.07)*MAJAGFCX + (.56)*CPLESSEN + (-.27)*JOINTKIL
     + (-.53)*NOCCNDUC + (-.21)*VBLUSKL + (.11)*VHISTAT + (-.43)*VINJFEAR
     + (.16)*STRANGER + (-.09)*DISFIGHT + (-.12)*IDWITCOP + (.05)*EVIDINDX
     + (.24)*DEADFACT;
SNIDM = -.02 + (-.49)*DEFFEAR + (.13)*EXECUT + (.03)*MINAGFCX
     + (-.16)*DPGHIS + (-.61)*MITMOTVE + (.51)*MADLOVER + (.35)*INSMOT
     + (.14)*NONPROPC + (.06)*MAJAGFCX + (.01)*DPSTCRIM + (-.52)*CPLESSEN
     + (.26)*INSANDEF + (-.31)*NOSPAGCM + (.32)*PANIC + (.06)*EVIDINDX;
DTNSNIDM < .15 THEN DSENSCAM = 1 ;
LSE IF .15=<DTNSNIDM<.31 THEN DSENSCAM = 2 ;
LSE IF .31=<DTNSNIDM<.47 THEN DSENSCAM = 3 ;
LSE IF .47=<DTNSNIDM<.59 THEN DSENSCAM = 4 ;
LSE IF .59=<DTNSNIDM<.695 THEN DSENSCAM = 5 ;
LSE IF .695=<DTNSNIDM<.85 THEN DSENSCAM = 6 ;
LSE IF .85=<DTNSNIDM<1.00 THEN DSENSCAM = 7 ;
LSE IF DTNSNIDM >= 1.00 THEN DSENSCAM = 8 ;
PTRIDXLM < -.794 THEN H7PRLGSL = 0 ;
LSE IF -.794 =< PTRIDXLM < -.389 THEN H7PRLGSL = 1 ;
```

DB 90

Table 42

RACE OF VICTIM DISPARITIES IN DEATH SENTENCING RATES WHEN DEFENDANTS INDICTED FOR MURDER CONTROLLING FOR THE PREDICTED LIKELIHOOD OF A DEATH SENTENCE AND THE RACE OF THE VICTIM 1/

A	B	C	D	E	F	G	H	I	J
Predicted Chance of of a Death Sentence (Decile) to 8 Decimals	Average Actual Sentencing Rate for the Cases at Each Level	Death Sentencing Rates for Black Defendants Involving: White Victim Cases	Black Victim Cases	Arithmetic Difference in Race of the Victim Rates (Col C-Col D)	Ratio of Race of the Victim Rates (Col C/Col D)	Death Sentencing Rates for White Defendant Involving: White Victim Cases	Black Victim Cases	Arithmetic Difference in Race of the Victim Rates (Col G-Col H)	Ratio of Race of the Victim Rates (Col G/Col H)
1	.0 (0/35)	.0 (0/9)	.0 (0/19)	.0	0	.0 (0/5)	-	-	-
2	.0 (0/55)	.0 (0/8)	.0 (0/27)	.0	0	.0 (0/19)	.0 (0/11)	.0	0
3	.08 (6/76)	.30 (3/10)	.11 (2/18)	.19	2.73	.03 (1/39)	.0 (0/9)	.03	0
4	.07 (4/57)	.23 (3/13)	.0 (0/15)	.23	-	.04 (1/29)	-	-	-
5	.27 (15/55)	.35 (9/26)	.17 (2/12)	.18	2.06	.20 (4/20)	-	-	-
6	.17 (11/64)	.38 (3/8)	.05 (1/20)	.33	7.60	.16 (5/32)	.50 (2/4)	-.34	.32
7	.41 (29/71)	.64 (9/14)	.39 (5/13)	.25	1.64	.39 (15/39)	.0 (0/5)	.39	0
8	.88 (51/58)	.91 (20/22)	.75 (6/8)	.16	1.21	.89 (25/28)	-	-	-

1/ The overall race of victim disparity estimated with a logistic coefficient measure was 1.31 (with a death odds multiplier of 3.71 statistically significant at the .01 level (adjusted R^2 was 10.56). These results were produced with the procedure described in Appendix G, Part IV. The overall race of victim measure comparable to a least squares regression coefficient is .06.

ORIGINAL

Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-5449

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM ANDREWS,

Petitioner,

vs.

KENNETH SHULSEN, Warden, Utah State Prison and DAVID L. WILKINSON, Attorney General of the State of Utah,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR THE RESPONDENTS

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I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE TENTH CIRCUIT'S DETERMINATION THAT NO EVIDENTIARY HEARING WAS REQUIRED ON PETITIONER'S RACE DISCRIMINATION AND FAIRNESS OF THE TRIAL ISSUES BECAUSE: (1) THE RULING IS IN ACCORD WITH CONTROLLING PRECEDENT AND THE VAST WEIGHT OF FEDERAL AUTHORITY; (2) THE DECISION BELOW TURNS ON ITS OWN FACTS; (3) PETITIONER MISSTATES ESSENTIAL FACTS; AND (4) PETITIONER PROCEDURALLY DEFAULTED THE RIGHT TO LITIGATE HIS RACE DISCRIMINATION CLAIMS ON FEDERAL HABEAS CORPUS.....12

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NO. 87-5449

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM ANDREWS,

Petitioner,

vs.

KENNETH SHULSEN, Warden, Utah State Prison and DAVID L. WILKINSON, Attorney General of the State of Utah,

Respondents.

BRIEF IN OPPOSITION FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. The Trial.

Petitioner Andrews and two co-defendants, Selby and Roberts, all three of whom were black, were charged in the Second Judicial District Court, Weber County, Utah with three counts of first degree murder and two counts of aggravated robbery for the killings of three persons in the course of a robbery at the Hi-Fi Shop in Ogden, Utah. They were the first to be tried under the 1973 Utah capital punishment statutes, Utah Code Ann. §§ 76-3-206, 207 (Supp. 1973); § 76-5-202 (Supp. 1973) (set forth in Appendix A). The statutes require a showing of an intentional or knowing killing under certain statutorily defined aggravating circumstances to be proved beyond a reasonable doubt at the guilt phase as elements of first degree murder, followed by a separate sentencing hearing where mitigating circumstances and additional aggravating factors are considered. The defendants were charged and the jurors were instructed at the guilt phase on six aggravating circumstances in this case: (1) multiple intentional killings; (2) at the time of the killing, intentionally creating a great risk of death to others than the victim and himself; (3) killing in perpetration of a robbery; (4) killing in perpetration of a rape; (5) killing for the purpose of pecuniary gain; and (6)

killing for personal gain (R. 159, 201, and Instr. No. 8 at R. 351-52).[1]

1. The Guilt Phase.

The following evidence was adduced at the guilt phase of the trial:

On April 22, 1974, the basement of the Hi-Fi Shop in downtown Ogden, Utah, became the scene of a brutal and torturous four-hour detention, robbery and murder which left three people dead and two seriously wounded.

Store employees, Stanley Walker (early 20's), Michelle Ansley (19), and their acquaintance Cortney Naisbitt (17), were taken captive by Andrews and Selby at gunpoint into the basement of the Hi-Fi Shop sometime between 5:45 p.m. and 7:00 p.m. (3058, 3060-61).[2] They were bound hand and foot (3069-70). Petitioner and Selby then removed virtually the entire inventory of stereo equipment from the store.

Stanley's father, Orren Walker, became concerned when his son failed to come home for dinner. At 7:45 p.m. he went to the Hi-Fi Shop. He entered and saw that most of the stereo equipment was missing. As he approached the basement stairway, Andrews and Selby confronted him with guns and forced him down the stairs.[3] Selby's gun discharged twice which momentarily startled Andrews who was standing in front of Selby at the time and prompted him to say, "What did you do that for, man?" (3071-72). After Orren reached the basement, Andrews opened his revolver and gave the chamber a roll (3068). Orren observed the three young people lying on the floor pleading for their lives saying they were too young to die and begging Andrews and Selby to just take the equipment and leave (3072-75). Orren overheard

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1 The jurors were also instructed that they had to unanimously agree on at least one of the aggravating circumstances to convict and were barred from accumulating their vote on differing alternatives pleaded by the State (Instr. No. 11, R. 356).

2 This notation refers to the trial transcripts. "R" refers to the state record of pleadings.

3 Andrews was armed with a .38 caliber short-barreled revolver (1981, 1986, 3068), and Selby with a .25 caliber, semi-automatic automatic (1979, 1982-88, 3068).

discussion between the two assailants. Selby said, "What about me being booked?" and waived his gun toward the south (the direction of the Weber County jail) (3074-75). The victims continued to plead for their lives (3075). The assailants then began discussing a tall container which they had previously put on a stool. It had a cloth placemat wrapped around it so that any labels could not be read (3075-77). Selby went to the workshop toward the center of the basement and returned with a cup (3076). Andrews uncapped the tall container and poured a substance into the cup which Selby tried to force Orren to give the victims to drink (including Orren's own son) (3077, 3085). Michelle asked what it was and Andrews said it was a mixture of vodka and a German drug (3077). It was Drano, a liquid drain cleaner containing sodium hydroxide (2208-10).[4] When Orren refused to administer the caustic, Andrews placed a gun at his head and threatened him saying, "Man, there is a gun at your head!" (3078). Orren still refused, so Selby set the cup back on the stool and tied Orren's hands and feet while Andrews held a gun on Orren. Orren was ordered to lie down on the basement floor by the others (3078-80).

Carol Naisbitt also became concerned when her son, Cortney, failed to return home. She too went to the Hi-Fi Shop arriving at about 8:00 p.m. Selby captured her at gunpoint upstairs while Andrews guarded the other victims. She was then placed bound next to her son on the basement floor (3080-81, 3083). Andrews had Selby run back upstairs to lock the door to the shop (3081, 3083).

At approximately 8:30 p.m. (3149), in front of the others, Selby compelled Carol to drink the drain cleaner which Andrews had poured, which caused loud coughing and spitting (3084-85, 3127, 3182). In turn Cortney, Stanley, Michelle, and Orren were forced to drink. Each successive ingestion caused

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4 Three weeks earlier, Selby was seen at the movie "Magnum Force," a scene from which depicts a pimp pouring Drano down a prostitute's throat to kill her (1614-15). Notably, the owner of the Hi-Fi Shop testified there was no liquid Drano kept at the store, and he did all purchasing for the business (2920).

hard coughing, spitting, and violent vomiting, yet Andrews continued to pour and Selby continued to administer the corrosive chemical (3084-87, 3128, 3182).[5] Orren noted the liquid smelled extremely strong, that it stung violently, and burned his mouth (3086). Unlike the other victims, Orren did not swallow the substance, but held it in his mouth and eventually let the chemical slowly drain unnoticed out of his mouth (3087). His forehead and shoulder became badly scarred from lying in the resulting pool (3133). Stanley could still speak and so was given a second dose which produced yet more violent vomiting (3087). To ensure that the Drano had its desired effect, both assailants covered three of the victims' mouths with tape (2189, 3087-88). At no time did Andrews display any fear over pouring the Drano, and at no time did either assailant threaten the other if he did not administer the substance (3208, 3211).

At 9:00 p.m. the assailants conversed in whispers and then went upstairs to wipe up fingerprints (3088-91, 3186). They returned to the basement (3092, 3186, 3208-09), and as Orren feigned death, Selby removed Orren's watch and wallet (3095-96).

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[5] Autopsies on Michelle, Carol and Stanley revealed extensive sodium hydroxide burns on their lips, gums, tongues, larynxes, esophaguses, stomachs and other parts of their bodies which came in contact with the chemical (2142-43, 2169-70, 2183, 2194-98). Their gastro-intestinal tracts were described as eroded, corroded and acutely burned to the degree of being almost hemorragic (the chemical had eaten and burned the surface layer of mucosa and connective tissue of the esophagus) (2143, 2169-70). Although Cortney survived, he too sustained severe damage to his gastro-intestinal tract having developed webs at the top of his esophagus and a stricture at the bottom. He also suffered drainage from his esophagus, passed part of his stomach rectally, lost over forty pounds by the time of trial, ran temperatures of 104 degrees, and developed peritonitus due to leakage from his esophagus that burned through the diaphragm and leaked into the peritoneal cavity (2547-51). The state medical examiner concluded that but for the intervening gunshot wounds the victims later received, the Drano would have caused their deaths if they had been left unattended for 12-24 hours (2199-2201, 2550). Even then, whether they would have died would have depended on how good the medical attention was because the damage from the Drano was so severe (2199). The burning would have completely torn up all the layers of organs leaving scarring and a narrowing of the esophagus, rendering the persons unable to eat properly, and requiring constant medical attention the rest of their lives (2201). The chemical would have continued to burn until it perforated the esophagus spilling into the chest where the heart and lungs are unprotected--a condition which would cause immediate death (2199). Also if the stomachs became perforated, the peritoneum cavity would be burned causing peritonitus (the life-threatening condition which Cortney eventually developed) (2199-2200, 2550).

Andrews asked how much was in it, and Selby disgustedly said, "five bucks." Andrews told Selby to "take the whole thing," which he did (3095). Orren heard mumbled conversation between the assailants, but could only discern Andrews saying, "I can't do it, I'm scared" and later Selby's reply to Andrews saying, "about thirty minutes" (3092-93, 3095, 3187). Andrews then ran upstairs. The back door opened and closed (3092). The door was not rebolted (3213).

Selby remained downstairs with the victims for the final thirty minutes of the four hour detention (3096). He shot Carol in the head while she lay facing her son (3101, 3084). He shot Cortney in the head thirty seconds later (3101). Four minutes later, Orren heard a bullet strike the floor near his head (3101). Two minutes later, he heard his son, Stanley, shot (3102). Selby left momentarily, and Orren heard Michelle ask Stanley if he was all right (3102). Stanley was able to reply that he had been shot (3102). Selby then returned and a bullet "stung" into Orren's head (3103). All of the foregoing shots were from the .25 caliber automatic (2182, 2192. 3084, 3101-02). Selby untied Michelle and took her into a back room (3103-04, 3127). Orren continued to feign death (3105). When Selby brought Michelle back fifteen minutes later, she was naked. She had been raped (3106-10, 2176-79). Selby laid her down at her appointed place and then ran upstairs (3109). Selby returned now armed with Andrews' .38 caliber revolver and shot Michelle in the back of the head (2144, 2192, 3109-10). Stanley was then shot a final time with the .38 (1938-42, 2192).[6] His breathing, which Orren had been able to hear up to that time, now ceased (3110).

Selby tried to discern if Orren was dead (3112). He then attempted to strangle Orren with an electrical cord (3110, 3119). Only by tensing the muscles of his neck was Orren able to survive the strangulation attempt while still playing dead (3110). The cord was left so tightly tied, his head swelled

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[6] Police officers located five .38 caliber slugs at the scene which had all been fired by the same gun (1892, 1906, 1910, 1913, 1918, 1922-23, 1942-43, 1986-93). Another .38 caliber slug was removed from Stanley's head during the autopsy (1938-42).

(3119). Orren felt a pointed object shoved into his ear and kicked three times (1846, 3111, 3113). It was a seven-inch long ballpoint pen (3124-25). Somehow Orren was able to keep from flinching as he felt the pen go deeper and deeper with each kick (3112-13). All but two inches of the pen entered his head (3125). Orren continued to feign death (3112-13). Finally, all assailants were gone.

Sometime after 10:00 p.m., Orren heard the voice of his other son and his wife upstairs, and the four hours of immediate terror were over (1800). Michelle and Stanley lay dead. Carol Naisbitt died en route to the hospital. Cortney survived but with serious permanent injuries. Orren survived to give eyewitness testimony at the trial (3057-3136).

In addition to Orren's personal account, witness after witness corroborated his testimony and implicated Andrews and Selby.[7]

Andrews and Selby were found guilty on three counts of first degree murder and two counts of aggravated robbery. Their co-defendant, Roberts, was convicted of the aggravated robbery charges but the jury could not return a verdict on the murder counts (4108-09).[8]

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[7] Some of this evidence is summarized in the federal district court's opinion in Andrews v. Shulsen, 600 F. Supp. 408, 413 n. 2 (D. Utah 1984). Notable are the facts that one witness overheard Andrews, two months prior to the crime, state that "One of these days I would like to rob a hi-fi shop and if anybody gets in my way I will kill them." (1549) (emphasis added). Three days before the murders, Andrews and Roberts were seen "casing" a stereo wholesale business with four other people (1564-68). Two days before the murders, Andrews and Selby were seen at the Hi-Fi Shop asking Stanley Walker about stereo prices, and writing down prices and serial numbers of stereo equipment, etc. Selby was observed at that time going to the back stairway and looking down into the basement (1577-88, 1590-94). The day after the homicides, Andrews, Selby and Roberts left a .25 caliber automatic with a friend saying there was going to be a raid on the Air Force base (where they were stationed and resided) (2321-23). Roberts also asked the friend to hold a stereo tape deck for Andrews. Andrews told the friend not to tell anyone, saying it was "hot" (2325-26). The tape deck contained Orren Walker's watch (2417-18). The watchband was found in a wastebasket in Andrew's room (3054).

[8] Facts relating to Robert's participation in the events have been omitted from this brief.

2. The Sentencing Hearing.

A separate sentencing hearing was held pursuant to Utah Code Ann. § 76-3-207 (Supp. 1973). The State introduced Andrews' military records reflecting several disciplinary actions for failure to report to duty, leaving his appointed place of duty, and leaving the scene of an accident. His military grade was reduced for misconduct, and the Air Force had commenced action to have him separated early from the service on grounds he was a "marginal performer . . . of limited potential." (4142-46). Evidence was also introduced that Andrews was on probation for felony theft when the murders occurred (4195).

Andrews testified concerning his family background, level of education (high school equivalent), and prior criminal history (burglary and auto theft) (4247-70).

The sentencing instructions (1) required that any death verdict be unanimous (Sent. Instr. No. 6, R. 416); (2) required the jury to consider and weigh the aggravating factors against the mitigating ones (Sent. Instr. No. 1, R. 412);[9] (3) placed the burden of proof to show the jury that a death sentence was appropriate on the State (Sent. Instr. No. 2, R. 412); (4) allowed the jury to consider evidence received at both guilt and penalty phases (Sent. Instr. Nos. 4 and 1, R. 414, 412); (5) focused the jury's attention on the nature and circumstances of the crime, the character of the defendant, his background, personal history, his mental and physical condition and other factors; (6) specifically focused on such factors as whether defendant had any significant criminal history, whether the murder was committed under the influence of any mental or emotional disturbance or duress, whether he acted under duress or substantial domination of another person, the general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct

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[9] On Andrews' and Selby's direct appeal, the Utah Supreme Court articulated Utah's capital sentencing standard as requiring the State to prove that "the totality of evidence of aggravating circumstances must . . . outweigh the totality of mitigating circumstances," and found the sentencing instructions in this case satisfied this requirement. State v. Pierre, 572 P.2d 1338, 1348 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978).

to the standards required by law and whether such capacity was substantially impaired as a result of any mental disease or intoxication, the youth of the defendant at the time of the crime, whether he was a party to the murder committed by another person and his participation was relatively minor; and (7) expressly prohibited the jury from considering any information not presented in the trial or sentencing proceedings (Sent. Instr. No. 4, R. 414). Cf. Utah Code Ann. § 76-3-207 (Supp. 1973).

The jury returned unanimous verdicts of death on all three murder counts on November 20, 1974 (4306). On November 27, 1974, the trial court sentenced Petitioner and Selby to death in accordance with Utah law.

B. The Direct Appeal.

Petitioner and Andrews unsuccessfully challenged their convictions and sentences on direct appeal. State v. Pierre, 572 P.2d 1338 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978); State v. Andrews, 574 P.2d 709 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978). The Utah Supreme Court held inter alia that Utah's statutes on their face and as applied met the constitutional requirements of Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 152 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). State v. Pierre, 572 P.2d at 1345, 1356; State v. Andrews, 574 P.2d at 710. The court performed the review function suggested by those cases by examining the record and determined that the death sentences had not been arbitrarily, discriminatorily or disproportionately imposed in either Andrews' or Selby's case. State v. Andrews, 574 P.2d at 710-11; State v. Pierre, 572 P.2d at 1355. The court also found that they had received a fair trial, and that their jury had been impartial. State v. Pierre, 572 P.2d at 1348-50; State v. Andrews, 574 P.2d at 710.

Certiorari was denied by this Court on October 2, 1978 in Andrews v. Utah, 439 U.S. 882 (1978).

C. The Initial State Postconviction Proceedings.

Petitioner and Selby pursued collateral proceedings in state district court attempting to relitigate claims raised on direct appeal, and to litigate claims not previously asserted.10

The petitions were dismissed by the court on the ground that all issues were either raised or could have been raised on direct appeal, and were thus barred from post conviction review under Utah law. The new claim of arbitrary and discriminatory application of the death penalty in Utah and the United States was additionally rejected for failure to state a claim. The state district judge's findings and conclusions are quoted in full in Andrews v. Morris, 607 P.2d 816, 819-20 (Utah 1980).

The Utah Supreme Court affirmed the lower court's dismissal of the petitions based upon procedural bar. See the companion decisions of Andrews v. Morris, 607 P.2d 816, 818-21 (Utah), cert. denied, 449 U.S. 891 (1980); Pierre v. Morris, 607 P.2d 812, 813-15 (Utah), cert. denied, 449 U.S. 891 (1980). The court found dismissal was also appropriate because the petitions for relief were drawn in conclusional language and were lacking in factual data to support their allegations. Andrews, 607 P.2d at 821. It alternatively rejected the claim of systemic discriminatory application of the death penalty as a matter of law relying on the rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.), cert. denied, 440 U.S. 976 (1979), reh'g denied,

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10 Among Andrews' new claims were (1) that Utah's death sentencing system had no standards or burdens of proof for finding and weighing the aggravating and mitigating factors for capital sentencing; (2) that the imposition of the death penalty without an express finding that he took a life or intended that a life be taken was unconstitutional; and (3) that the application of the death penalty in Utah and the United States was arbitrary and discriminatory. See Am. Petition, 11/24/78, St. H.C.R. Vol. I at pp. 5-10 (R. Vol. XV) (Attached as Appendix B). As will be shown infra, Andrews did not raise in his state habeas petition, and never raised in the state courts, several of the claims he now asserts in his Petition for Certiorari. Specifically, he failed to raise most of the facts he now offers in support of his claim of systemic race discrimination and race discrimination specific to his own case; he failed to raise the issue whether Utah's death sentencing permits a death sentence to be imposed upon consideration of aggravating factors that do no more than repeat elements of the crime (his Lowenfield v. Butler claim); and he never asserted that the reasonable doubt sentencing standard announced in State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988 (1982), was required under the Eighth Amendment of the federal constitution.

441 U.S. 937 (1979). Pierre, 607 P.2d at 814; Andrews, 607 P.2d at 825.

Certiorari was denied by this Court on October 6, 1980. Andrews v. Morris, 449 U.S. 891 (1980).

D. Initial Federal District Court Proceedings.

In November 1980, Andrews and Selby filed for federal habeas corpus relief. Respondents moved to dismiss the petitions on the dual grounds that the issues could be dismissed as a matter of law without need for an evidentiary hearing, and that petitioners were procedurally barred from litigating certain claims. The court issued a Preliminary Order authorizing an evidentiary hearing on two issues: (1) whether an inherently prejudicial atmosphere prevailed at trial and the jurors were exposed to specific improper influences; and (2) whether Utah's death penalty was being arbitrarily and discriminatorily applied systemically.[11] Limited discovery on these issues was permitted.

Immediately prior to the scheduled hearing, the Utah Supreme Court issued a ruling in another capital case modifying Utah's capital sentencing standard from that which had been applied in petitioner's, Selby's, and other capital defendants' cases:

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in the circumstances.

State v. Wood, 648 P.2d 71, 78 (Utah), cert. denied, 459 U.S. 988 (1982).[12] The Wood ruling was not based on federal or state constitutional grounds, but on "preferred grounds of statutory

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11 Petitioner had not specifically alleged or sought an evidentiary hearing to establish whether racially prejudicial factors were present in his own case. Thus, the preliminary order does not address this subject.

12 Neither Selby nor Andrews had ever argued for this particular sentencing standard in prior state court proceedings. See State v. Wood, 648 P.2d at 80; State v. Pierre, 572 P.2d 1338; State v. Andrews, 574 P.2d 709; Pierre v. Morris, 607 P.2d 812; Andrews v. Morris, 607 P.2d 816; Andrews v. Morris, 677 P.2d 81, 86-88 (Utah 1983). See also all briefs in those cases.

construction." 648 P.2d at 82-83. Further proceedings on federal habeas corpus were stayed and petitioners were ordered to return to the Utah Supreme Court to seek possible relief under the Wood decision on the theory that Wood might be dispositive of the instant litigation and the Utah Supreme Court should determine the issue of retroactive application of state law (R. Vol. VI, 1086).

E. The Second State Postconviction Proceeding.

Petitioner and Selby filed petitions for writs of habeas corpus in the Utah Supreme Court seeking an order vacating their death sentences on the theory that the sentencing standard applied in their case was insufficient in light of Wood, that use of the previous standard in their case was not harmless error, and that failure to give them the retroactive benefit of Wood would deny them equal protection of the law. The court denied relief on all grounds, applying well-established federal principles of retroactivity law and state doctrines of harmless error and finding no merit to their equal protection claim. Andrews v. Morris, 677 P.2d 81 (Utah 1983).[13]

F. The Renewed Proceedings in Federal District Court.

Having exhausted state remedies on the Wood issue, the parties resumed the federal habeas proceedings. Petitioner and Selby were granted leave to file Second Amended Petitions. The parties were ordered to file supplemental memoranda on all issues on the law occurring since the prior briefing of the case, and on whether an evidentiary hearing would still be required on the two issues previously set forth in the court's Preliminary Order. See Scheduling Order (R. Vol. VI, 1089-90).

After considering the petitions, memoranda, arguments of counsel, pertinent authorities, and the entire record, the District Court denied petitioner's various claims on the merits and determined that no further evidentiary hearing was required on any issue. Andrews v. Shulsen, 600 F. Supp. 412 (D. Utah 1984); Selby v. Shulsen, 600 F. Supp. 432 (D. Utah 1984).

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[13] The Utah Supreme Court has since applied the Wood standard to one defendant whose case, unlike petitioner's, was pending on direct appeal when Wood was decided. State v. Norton, 675 P.2d 577 (Utah), cert. denied, 466 U.S. 942 (1984).

G. Tenth Circuit Court of Appeals.

Petitioner and Selby appealed to the Tenth Circuit Court of Appeals which affirmed the denial of habeas corpus relief in Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), reh'g denied, No. 84-2781, June 8, 1987; and Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986), reh'g denied, No. 85-1021, Nov. 3, 1986.

This Court denied certiorari in Selby's case on April 27, 1987, and denied his petition for rehearing on June 22, 1987. (Selby v. Shulsen, No. 86-6303). He was executed on August 28, 1987. Andrews now petitions this Court for the third time for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE TENTH CIRCUIT'S DETERMINATION THAT NO EVIDENTIARY HEARING WAS REQUIRED ON PETITIONER'S RACE DISCRIMINATION AND FAIRNESS OF THE TRIAL ISSUES BECAUSE: (1) THE RULING IS IN ACCORD WITH CONTROLLING PRECEDENT AND THE VAST WEIGHT OF FEDERAL AUTHORITY; (2) THE DECISION BELOW TURNS ON ITS OWN FACTS; (3) PETITIONER MISSTATES ESSENTIAL FACTS; AND (4) PETITIONER PROCEDURALLY DEFAULTED THE RIGHT TO LITIGATE HIS RACE DISCRIMINATION CLAIMS ON FEDERAL HABEAS CORPUS.

The central issue before the Tenth Circuit concerning petitioner's claims of discriminatory application of the death penalty in his case and in Utah's death sentencing system as a whole was whether the District Court had properly found that the proffers Andrews made on the claims were so lacking that no evidentiary hearing was required. Andrews v. Shulsen, 802 F.2d 1265-70 (10th Cir. 1986), reviewing the District Court's holding in Andrews v. Shulsen, 600 F. Supp. 408, 425-26 (D. Utah 1984). The Tenth Circuit noted that conclusory allegations in habeas proceedings will not suffice to warrant an evidentiary hearing and that a habeas petitioner must provide supporting factual allegations (citing Bashor v. Risley, 730 F.2d 1228, 1233-34 (4th Cir.), cert. denied, 469 U.S. 838 (1984), and Townsend v. Sain, 372 U.S. 293, 312 (1963)). 802 F.2d at 1266 (1986). Andrews' proffer as to race discrimination in his particular case was

found conclusory and inadequate. Id. at 1266.[14]

His separate proffer to support his claim that Utah's death sentencing system as a whole discriminatorily imposes the death penalty on blacks or those whose victims are white was also found wholly inadequate to necessitate any evidentiary hearing, 802 F.2d at 1269-70. Although the Tenth Circuit, unlike this Court in McCleskey v. Kemp, 107 S. Ct. 1756 (1987), found that a petitioner need only proffer "an appropriately formal study that generates statistically significant results" [of disparate impact] "while accounting for the effect of other causal variables" to obtain an evidentiary hearing on this claim, 802 F.2d at 1269, the court found that Andrews' proffer did not even satisfy this lesser standard.[15] Despite the 12-year history of this case, his proffer did not even reflect a development of "the evidence that is available so as to provide some factual basis for relief" or address "other causal factors, such as degree of

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[14] To illustrate, in his Second Amended Petition to the District Court, attached as Appendix C, he stated that he was a black, male, non-Utah resident who had been impoverished all his life, and his victims were caucasians, life-long residents of Utah, and prominent members of the local community, and that "These facts actually influenced the State police, prosecutors, courts and jurors in their decision making in this case." Second Am. Pet. at 20. He failed to allege specifics to support this claim. He asserted "The jurors received racially prejudicial communications during his trial, but he failed to identify what they were. Id. at 22. He claimed that the race of the defendants were prominently mentioned in the local press and among citizens of Davis and Weber Counties but he failed to provide specifics as to when this occurred, whether the articles had racial overtones beyond identifying individuals as white or black, whether the jurors had read and been influenced by the articles, or how this factor adversely affected or prejudiced his case. He generally claimed that non-white jurors were excluded from the trial by the use of prosecutorial peremptory challenges and by jury selection techniques which excluded from jury eligibility the majority of non-white individuals in Weber and Davis Counties. Id. Again, he failed to provide specifics to support these allegations. Finally, he generally claimed that in every capital case in Utah, most of the jurors have been members of the L.D.S. Church and at the time of his trial, the Church's doctrine was that blacks were not equal to whites. This was part of his broader claim of systemic discrimination rather than an assertion of discrimination in his case. He offered no facts to establish that such factors, assuming they did exist, had actually prejudiced the jurors in his case. The allegation did not indicate that Andrews even knew the religious affiliation of the jurors in his own case.

[15] The proffer is found in Andrews v. Shulsen, 802 F.2d at 1269. it is taken from Andrews' Second Amended Petition and the Tenth Circuit even took into account more current data alleged in Andrews' brief on appeal.

aggravation involved in the murders." 802 F.2d at 1269.[16]

The Tenth Circuit separately found, after reviewing the record, that the District Court properly applied the principles of Townsend v. Sain, in determining that no further evidentiary hearing was required on petitioner's related claims as to the general fairness of his trial (i.e. adverse publicity, hostile community sentiment and trial atmosphere, refusal to grant his change of venue, continuance and sequestration motions, etc.), 802 F.2d at 1260. The District Court had concluded that the facts on these claims were adequately developed in and resolved by the state courts; that full and fair hearings were held thereon; and that other than the single incident during a meal period where one or more jurors were exposed to a napkin containing a racial slur, petitioner "made no specific factual allegations indicating a hostile trial atmosphere or that jurors were exposed to improper influences during the trial or during the period between the guilt and penalty phases." 600 F. Supp. 415-20. On this latter claim the District Court, citing Bashor v. Risley, 730 F. 2d 1228, and Boehme v. Maxwell, 423 F.2d 1056, 1058 (9th Cir. 1970), found the allegations too "conclusory and wholly devoid of specifics" to require an evidentiary hearing. 600 F. Supp. at 416. It also noted that "[o]ther than the napkin incident, petitioner has not alleged there was actual contact by any juror to publicity or improper information during the trial or between trial phases." 600 F. Supp. at 420. Finally, the

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[16] On rehearing, Andrews for the first time submitted an affidavit detailing statistical data he claimed he "would have" presented had the District Court held an evidentiary hearing. He did not attest to the accuracy of the new facts and data. His affidavit also contained facts which purportedly occurred after his appeal was taken. He attaches this affidavit as Appendix E to his petition for certiorari. None of this material was ever proffered to the District Court and was thus outside the record on appeal. Respondents nevertheless filed a counter-affidavit on rehearing refuting the reliability and validity of Andrews' new statistical data. This counter-affidavit is attached to this brief as Appendix D. Rehearing was eventually denied. As will be shown, Andrews continues to offer new factual data on certiorari which he never proffered to the lower courts under the guise that he "would have" produced it had he been given the chance. But the question before this Court is the adequacy of the various proffers Andrews actually made to the District Court, not the adequacy of evidence he now submits but never before revealed.

napkin incident was found to have been fully and fairly resolved by the state courts. 600 F. Supp. at 419-20 (citing State v. Andrews, 576 P.2d at 858-59).

Petitioner challenges these rulings claiming that his various proffers were sufficient to warrant an evidentiary hearing,[17] and that the state courts did not fully and fairly resolve some of the claims. Certiorari should not be granted because the rulings of the District Court and Tenth Circuit are in accord with controlling precedent and the great weight of authority and petitioner offers nothing to warrant a reexamination of settled principles; the decision below turns on its own facts; and petitioner misstates essential facts. Certiorari also should be denied on petitioner's dual claims of race prejudice because, despite the Tenth Circuit's ruling to the contrary,[18] Andrews procedurally defaulted these claims in the state courts and failed to establish cause for the default and prejudice resulting therefrom.

A. THE TENTH CIRCUIT FOLLOWED CONTROLLING PRECEDENT WHICH SHOULD NOT BE REVISITED; THIS CASE TURNS ON ITS OWN FACTS; AND PETITIONER MISSTATES ESSENTIAL FACTS IN AN EFFORT TO GAIN REVIEW.

The current standards for mandatory evidentiary hearings in habeas corpus proceedings were introduced in Townsend v. Sain, 372 U.S. 293 (1962),[19] and were codified in 25 U.S.C.A.

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17 Because petitioner persists in embellishing his proffered facts with new facts he never before articulated, care must be taken to limit review solely to the adequacy of the proffer he actually made to the District Court.

18 See Andrews v. Shulsen, 802 F.2d at 1266 n. 8.

19 [W]here an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.
....
We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances; If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
Id. at 312-313.

section 2254. Since Townsend, this Court has consistently held that evidentiary hearings in habeas corpus proceedings are mandatory only in limited circumstances.[20] In reliance on these standards, lower federal courts have not granted evidentiary hearings in habeas corpus cases unless petitioners articulate specific facts which have not been fully and fairly litigated in state courts, and which, if proven true, would entitle the

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[20] In Blackledge v. Allison, 431 U.S. 63 (1976), petitioner was entitled to an evidentiary hearing because his allegations were not patently false or frivolous, but were specific:

> Allison alleged as a ground for relief that his plea was induced by an unkept promise. But he did not stop there. He proceeded to elaborate upon this claim with specific factual allegations. The petition indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication.

Id. at 74-75. See also Machibroda v. United States, 368 U.S. 487 (1962) (Clark J., dissenting) (petitioner alleged in his habeas proceedings that his guilty plea to bank robbery charges was involuntary because the prosecutor instructed him not to discuss the plea with his attorney, and the judge never questioned the petitioner about the voluntariness of his plea; this Court held that because the allegations were specific, could not be proved or disproved by the record, and would entitle the petitioner to relief if true, an evidentiary hearing was proper); Fontaine v. United States, 411 U.S. 213 (1973) (an evidentiary hearing was appropriate because the record did not disprove petitioner's factual allegations which were specifically supported by medical documentation); cf. Price v. Johnston, 334 U.S. 266 (1948) (under 28 U.S.C. 2243, petitioner's conclusory allegations without specific facts justified summary dismissal of his habeas corpus petition).

petitioners to relief.[21]

Petitioner failed to meet the accepted standards for mandatory hearings. The essence of his argument is that this Court should expand the circumstances in which criminal defendants may demand from federal courts evidentiary hearings in habeas corpus proceedings. If the Court agrees that petitioner's mere allegations were enough of a showing to require the District Court to engage in an evidentiary hearing, the resulting precedent would require an evidentiary hearing in every case in which a petitioner simply concludes that there was impropriety in his trial. Notions of discretion and the doctrine ascribing a presumption of correctness to state court findings of fact, both long held views of this Court, would be vitiated. Criminal

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[21] In Bashor v. Risley, 730 F.2d 1056 (9th Cir.,) cert. denied, 469 U.S. 838 (1984), the court explained why the petitioner was not entitled to an evidentiary hearing:

> In a memorandum attached to his petition, Bashor argued that a courtroom outburst at trial demonstrated that the trial was conducted in such a hostile atmosphere that he should have been granted a change of venue. Bashor failed to set forth in his petition for a writ of habeas corpus or in the memorandum any facts concerning the alleged courtroom outburst or supporting the conclusion that he was tried in a hostile community. A federal district court is not required to grant an evidentiary hearing where the allegations in the petition are "conclusory and wholly devoid of specifics." A habeas corpus petitioner seeking an evidentiary hearing must allege actual facts which if proved would entitle him to relief.
>
> In the absence of the allegation of any facts, the district court could only speculate about the nature of the "courtroom outburst". The district court did not err in refusing to hold an evidentiary hearing where no facts were pleaded from which it could be inferred that the petitioner was tried before a hostile jury or that the courtroom disturbance had a prejudicial impact on his constitutional rights.

Id. at 1233-34. See also Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir.) cert. denied, 440 U.S. 974 (1979) (if petitioner's allegations would not entitle him to relief if proven, no evidentiary hearing is required); Ross v. Hopper, 716 F.2d 1528 (11th Cir.) cert. denied, 428 U.S. 910 (1976) (petitioner's failure to identify any evidence that would support his claim that blacks and women were underrepresented in his jury combined with the fact that his claim had been fully and fairly litigated in state court to obviate any claim to an evidentiary hearing); Birt v. Montgomery, 725 F.2d 587 (11th Cir.), cert. denied, 469 U.S. 874 (1984) (assuming petitioner's allegations to be true, they did not entitle him to relief, and did not require an evidentiary hearing); Tucker v. Zant, 724 F.2d 882 (1984) (petitioner failed to isolate any facts, the development of which would support any material claim and thus was not entitled to an evidentiary hearing); Corn v. Zant, 708 F.2d 549 (11th Cir.) cert. denied, 467 U.S. 1220 (petitioner alleged discriminatory imposition of the death penalty, but failed to identify specific acts evidencing discriminatory intent, and the habeas court dismissed his "bare" allegation because there was nothing in it which the court could evaluate).

defendants would have precedent to justify such things as the use of statistical evidence of discrimination to challenge all convictions and sentences, a proposition this Court has recently rejected.[22]

Petitioner claims that the District Court's denial of an evidentiary hearing foreclosed proof that his conviction and sentence were not based on legitimate evidence of his guilt, but on racial prejudice harbored by the jury. The Tenth Circuit was correct in affirming the District Court's summary dismissal of petitioner's habeas corpus petition, which dismissal was justified by statute and precedent. Because petitioner's allegations were disproved by the record of the trial court,[23] because as a matter of law the allegations would not merit relief even if they were true,[24] because they were fully and fairly litigated in state trial, appellate, and collateral

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[22] In McCleskey v. Kemp, 107 S.Ct. 1756 (1987), this Court explained, in rejecting statistical allegations of discriminatory sentencing:

> [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, McCleskey's claim relates to the race of the victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could--at least in theory--be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.

Id. at 1779-1780 (footnote omitted).

[23] Summary dismissal of habeas petitions is appropriate when the allegations contained therein are "patently frivolous or false." Herman v. Claudy, 350 U.S. 116, 119 (1956).

[24] See Turner v. Bass, 753 F.2d 342, 347 (1985) rev'd on other grounds, 106 S.Ct. (1986); Spinkelink v. Wainwright, 578 F.2d 582.

proceedings,[25] and because they were vague and conclusory,[26] the District Court was not bound to grant petitioner an evidentiary hearing.

Petitioner claims that among the many allegations made to the District Court in his final Second Amended Petition[27] seven factors demonstrated that, in contravention of his Sixth amendment right to a fair trial and his Fourteenth amendment right to due process, his convictions and sentences were based on race, and required the District Court to hold an evidentiary hearing. Those factors were: (1) the jury was influenced by race-oriented publicity before and during the trial and between the penalty and guilt phases of the trial, i.e., knowledge of the races of defendants and victims, and the supposed "black power" article, (2) "non-white jurors were excluded from the trial of this case by a jury selection system that barred the majority of

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[25] See Ross v. Hopper, 716 F.2d 1528 (11th Cir.) cert. denied, 428 U.S. 910.

[26] See Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 448 n. 6 (1953); Bashor v. Risley, 730 F.2d 1228, 1233-34 (9th Cir.), cert. denied, 469 U.S. 838 (1984); Green v. Wingo, 454 F.2d 52, 54 (5th Cir. 1972); Boehme v. Maxwell, 423 F.2d 1058 (9th Cir. 1970); Schlette v. People, 284 F.2d 827, 833-34 (9th Cir.), cert. denied, 366 U.S.1 940 (1961); Dunn v. California, 401 F.2d 340, 342 (9th Cir. 1968).

[27] In his petition for certiorari, with no explanation besides the deceptive introductory phrase "he would have shown", petitioner submits new support for his claims of jury discrimination which he never presented to the lower state or federal courts. See petition page 4 (characterizing news coverage of defendant's shaking his fist at an eye-witness as coverage of a "black power" symbol); page 7 (first allegation that any of petitioner's jurors were members of the L.D.S. Church); page 7 (first allegation that statutory property requirements barred blacks from serving on juries in Davis and Weber Counties); page 7 (first allegation that the prosecutor intended to bar blacks from serving on jury); page 8 n. 3 (documentation of L.D.S. Church's purportedly anti-black doctrines; page 9 (raising for the first time an implication that the stick figure and message drawn on the napkin were drawn by a juror and seen by all of the jurors); page 16 (raising for the first time petitioner's claim that the presence and behavior of spectators and news reporters created a "carnival-line atmosphere"). In his Second Amended Petition, the napkin incident was the only race-specific factual allegation; in the alchemy of his Petition for Certiorari, all of petitioner's prejudicial publicity allegations have become racial issues. Although this new support bears the same fatal characteristics as petitioner's claims that were presented to the lower courts (they are vague, conclusory, and an insufficient bases for relief even if proven true), this Court is not required to evaluate new material raised for the first time on certiorari in deciding whether or not to grant certiorari. Irvine v. California, 347 U.S. 128, 129 (1954).

non-white citizens of Davis and Weber counties", (3) "the only black person called to sit on the jury was excused by the prosecutor, who employed a peremptory challenge to ensure that the jury would be all white", (4) "the jury . . . was affected by religious convictions that were prejudicial to black persons", (5) the jurors were exposed to manifestations of anti-Black community sentiment, i.e., the note saying "Hang the Niggers", (6) the imposition of the death sentence on black as opposed to white defendants is vastly disproportionate. Petition for Certiorari pp. 7-17.

The conclusion that petitioner expected the courts to infer and expects this Court to infer from these various factors is that his jury based its convictions and sentences on racial prejudice.

Yet, this conclusion is readily disproved by the record. As the Tenth Circuit observed, one of petitioner's co-defendants, Keith Roberts, was evaluated by the same jury that convicted and sentenced petitioner, was equally subjected to the media coverage that petitioner was subjected to, and was equally threatened by the napkin incident, Roberts was also black and was the only defendant represented by a black attorney (363), yet he was not convicted of murder charges, and thus not sentenced to death. See Andrews v. Shulsen, 802 F.2d at 1266.

Moreover, during the course of the voir dire, potential jurors were questioned by the judge, prosecutor, and defense attorneys about racial prejudice. One juror held such prejudices and was excused from serving (1013), but every other potential juror that was asked about racial prejudice denied harboring any such feelings, (112, 113, 122, 133, 142, 147, 165, 169, 190, 197, 198, 212, 227, 238, 240, 280, 300, 323, 345, 363, 365, 383, 398, 410, 412, 421, 443, 457, 483, 495, 508, 521, 540, 568, 580, 661, 672, 681, 721, 733, 764, 821, 867, 962, 1019, 1035, 1058, 1089, 1105, 1213, 1248, 1269, 1297). See Andrews v. Shulsen, 802 F.2d at 1266, 1270 ("prosecution and defense received ample opportunity to question prospective jurors about racial prejudice (citing Turner v. Murray, 476 U.S. 1 (1986)); and trial court

conducted extensive voir dire "on the issue of race to ensure an unprejudiced jury.")

1. PUBLICITY BEFORE AND DURING THE TRIAL AND BETWEEN THE GUILT AND PENALTY PHASES HAD NO EFFECT ON PETITIONER'S JURY.

Petitioner's excerpts from the voir dire, which he uses to demonstrate that his jury was affected by extensive publicity, are decidedly selective. The first (771-84), third (1230-52), fifth (751-70), and seventh (1282-1310) jurors quoted in the first full paragraph of page 15 of the petition agreed to serve impartially (771-84). The second juror quoted was not empaneled. The fourth juror quoted had no strong feelings about the case (377-89). The sixth juror quoted was concerned that the defendant be provided adequate counsel (T. 516-32).

Of the twelve jurors and one alternate that were actually impaneled, eleven stated during voir dire that they had not formed or expressed any opinions concerning defendants' guilt (1090, 1093, 1098; 460, 461; 1239; 772; 378, 381; 317, 322, 323; 1182, 1184; 393; 523, 1343; 757, 758). The only juror who had formed an opinion was the only juror challenged for cause by defense counsel (1309, 1105, 472, 1253, 784, 389, 332, 1191, 400, 532, 1356, 770), but the court stated that his sophistication and calmness indicated that he could serve as an impartial juror (1283, 1310). All of he jurors and the alternate stated that they could disregard publicity and presume the defendants innocent (1283, 1285, 1286, 1293, 1296, 1300; 1091, 1094, 1096; 458, 466, 467; 1237, 1243, 1252; 775, 776, 381; 326; 1183, 1188; 391, 399; 523, 526; 1355; 754, 758, 763). The extensive voir dire and repeated admonitions to the jury about avoiding prejudical contacts during the trial[28] support the Tenth Circuit and District Courts' determinations that the issue of prejudicial

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28 Almost thirty times during the voir dire alone, the trial judge instructed all of the potential jurors to avoid outside influence and premature and prejudiced decisionmaking (66, 102, 173-74, 176, 246, 251, 252, 254, 332-33, 415, 416, 552-53, 555, 632, 633-34, 747-48, 750, 815-16, 947, 950-51, 1-24-25, 1145, 1148, 1227-28, 1334, 1337-38, 1366, 1463-64, 1466). Such admonistions were repeated throughout the trial, and between the guilt and penalty phases the jurors were again admonished about contact with outside influences and at least seven jurors were expressly ordered not to go to work (4112-14).

community sentiments was correctly decided by the state courts.[29] Furthermore, jurors in petitioner's case even contacted the trial court after their service was complete, inquiring about the propriety of their discussing the case now that it was over (4310).

As a matter of law, in order to overturn his conviction on the grounds of prejudicial publicity, petitioner would have to show that the coverage of his case was inherently prejudicial or he would have to demonstrate the actual prejudice of his jurors.[30] Comparing the facts alleged by petitioner to those in Sheppard v. Maxwell, 384 U.S. 723 (1963); Rideau v. Louisiana, 373 U.S. 723 (1963), and Estes v. Texas, 381 U.S. 532 (1965), it is apparent that the coverage of petitioner's trial was not inherently prejudicial.[31] He likewise failed to allege or show actual prejudice.[32]

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29 Jurors are presumed to have followed the admonsitions of the trial judge. United States v. Hall, 536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976). See also Andrews v. Shulsen, 600 F. Supp. at 420 (summary of precautionary measures taken by trial court).

30 Murphy v. Florida, 421 U.S. 794 (1975).

31 See State v. Pierre, 572 P.2d 1338, 1350 (Utah), cert. denied 439 U.S. 882 (1978).

The so-called "black power" article might come closest to constituting inflammatory media assuming petitioner's characterization of it were true. However, the record paints a different picture. At the outset of the sentencing hearing, Andrews moved for a mistrial claiming news over the weekend reported that he had raised his fist and shook it at a state's witness when the verdict was read and that he and a co-defendant were playing poker, laughing and joking while waiting for the verdict (4120). The incident was never characterized as involving a "black power" gesture as petitioner now chooses to characterize it. Nor was it alleged that the article had any racial overtones. Andrews did not claim that the jurors had actually read the article or ask that they be questioned on the matter (4121), and the prosecutor was willing to call numerous witnesses to establish that the content of the article was indeed accurate (4122). On direct appeal, Andrews merely asserted that the jury should have been sequestered between the guilt phase and penalty phases, but offered no specifics to establish that actual prejudice had ever occurred. See Andrews' brief in State v. Andrews, Utah S. Ct. No. 13902 at 4-7. Because this is the only piece of inflammatory media proffered by petitioner, it did not put him in a quantitative position comparable to those in Sheppard, Estes, or Rideau. And because he failed to allege that any juror was exposed to it, it does not qualify as proof of actual prejudice.

32 See Irwin v. Dowd, 366 U.S. 717, 727 (1961); State v. Andrews, 576 P.2d 857 (Utah), cert. denied, 439 U.S. 857 (1978).

Prejudicial media coverage before and during the trial was considered at the trial in motions for change of venue, continuance, jury sequestration, and mistrial (65, 71, 73, 154, 156, 212, 1356-1357, 148, 161-63; 208; and 1367-69, 4114-4115; 2455, 3253) and on appeal.[33] In his habeas proceedings, petitioner had to demonstrate manifest error of the trial court in order to succeed in his claim that the jury was infected by prejudicial publicity.[34] The Utah Supreme Court, Federal District Court, and Tenth Circuit all found that the media coverage of petitioner's case was factual and not inflammatory.[35] In denying petitioner's request for an evidentiary hearing, both the District Court and the Tenth Circuit Court of Appeals, took note of the Utah courts' dispositions of these issues,[36] which are entitled to a presumption of correctness,[37] and which made it unnecessary for the District Court to hold an evidentiary hearing in petitioner's federal habeas corpus case.[38]

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[33] State v. Andrews, 574 P.2d 709, 710-13 (Utah) cert. denied, 439 U.S. 982 (1978); State v. Pierre, 572 P.2d 1338, 1348-50 (Utah) cert. denied, 439 U.S. 982 (1978).

[34] Patton v. Yount, 467 U.S. 1025 (1984). This Court has previously held that unless prejudicial community sentiments about a criminal case are so pervasive as to defy any claim that a jury in that area could serve without bias, community sentiments are not to be imputed to jury members. Petitioner would have this court expand the rule to include cases like his, where there is no more than speculation about how jury members might have been effected by community sentiment. Petitioner would also have this court rule that the lack of concern for community sentiment expressed by the jurors in his case should be ignored. To rule in such a way would seriously compromise the jury system. Voir dire and the juror's oath would be rendered meaningless.

[35] Dobbert v. Florida, 432 U.S. 282 (1977) explains that juror contact with non-inflammatory media does not justify a reversal of the verdict. See also Murphy v. Florida, 421 U.S. 794 (1975) (jury verdict not distrubed unless media coverage is inflammatory).

[36] Andrews v. Shulsen, 600 F. Supp. 408; Andrews v. Shulsen, 802 F.2d 1256.

[37] 28 U.S.C. § 2554(d); Sumner v. Mata, 449 U.S. 539 (1981); Patton v. Yount, 467 U.S. 1025 (1984); Ball v. Ricketts, 779 F.2d 578 (10th Cir.), cert. denied, 107 S. Ct. 236 (1986); Hurt v. Page 355 F.2d 169, 170 (10th Cir. 1966); Townsend v. Sain, 372 U.S. 293, 318 (1963); Wainwright v. Witt, 469 U.S. 412 (1985).

[38] 28 U.S.C. § 2254(d); Maxwell v. Turner, 411 F.2d 805, 807 (10th Cir. 1969); Sumner v. Mata, 449 U.S. 544, 547 (1981); Jolly v. Crouse, 411 F.2d 808, 809 (10th Cir. 1969).

Petitioner implies that media coverage which factually stated the races of defendants and victims must somehow have produced a racist verdict, but petitioner failed repeatedly to proffer enough facts to suggest that he could, if given the chance, prove his jurors were exposed to or affected by this coverage while they were serving in his case. As noted in the state court decisions and the opinions if the District and Tenth Circuit Courts, under most circumstances, prejudicial media coverage is not imputed to jurors without cause.[39] He claims now for the first time that a carnival-like atmosphere prevailed at his trial, but fails to provide specifics about this atmosphere or about the specific impact it had on the jurors.[40] The District Court was not obligated by petitioner's vague allegations of prejudicial publicity to grant petitioner an evidentiary hearing.[41]

2. UTAH'S JURY SELECTION SYSTEM DID NOT BAR NON-WHITE CITIZENS FROM JURY SERVICE.

Petitioner claims for the first time on certiorari that the majority of blacks in Davis and Weber Counties were barred from serving on his jury because under "former § 78-16-17 U.C.A. 1953", the jurors at the time of his trial had to be property

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[39] Murphy v. Florida, 421 U.S. 794 (1974); Patton v. Yount, 467 U.S. 1025 (1984).

[40] Under Smith v. Phillips, 455 U.S. 209, 217 (1982), a defendant raising such a claim must show specifically how alleged courtroom disturbances actually disrupted his jurors.

[41] Cf. Hopkinson v. Shillinger, 645 F. Supp. 374 (D. Wyo. 1986):

> [I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.
>
> Petitioner in the instant case argues that a general atmosphere of anxiety and fear was present throughout his trial and that abundant evidence of this exists in the transcript of voir dire. Petitioner has attached a number of exhibits in support of his assertions. The affidavits petitioner relies on are couched in general conclusionary terms and contain many hearsay statements. . . . The affidavit . . . does not refer to any specific security measures. . . . .
>
> The affidavit . . . is vague and conclusionary. There is no indication of any exposure to the jury of any abnormal security measures.

Id. at 410.

owners "on the assessment roles." Petition p. 7 n. 2. Petitioner not only miscites the pertinent statute, but flagrantly misstates it. No doubt he is referring to Utah Code Ann. § 78-46-17 (Supp. 1973), in effect at the time of his trial, which provided in pertinent part:

> It shall be the duty of the jury commissioners . . . to select from the names of the legal voters of the county for the current year a written list of names from which the grand and trial jurors shall be drawn to serve in the district court of such county during the succeeding year.

(Emphasis added.) The requirement that the legal voters be "on the assessment rolls" of the county was repealed in 1971 (three years before petitioner's trial). Laws of Utah 1971 (1st S.S.), Ch. 8 § 1. The 1973 provision was thus consistent with Utah Code Ann. § 78-46-8 (1953), which rendered persons competent to serve as jurors if they were "taxpayers of the state." Accordingly, the trial judge stated twice during the voir dire that if a potential juror paid sales taxes, he was statutorily qualified to serve (20, 677). Thus, petitioner's second allegation, that blacks were excluded from his jury by statutory property ownership requirements, is exposed as baseless by examining the law and the record.

In support of his contention that this new allegation of statutory discrimination justified the granting of an evidentiary hearing in the District Court, petitioner cites Vasquez v. Hillery, 106 S. Ct. 617 (1986). In Vasquez, however, this Court, quoting Picard v. Connor, 404 U.S. 270, 276 (1971), observed: "Under standards established by this Court, a state prisoner may initiate a federal habeas petition '[O]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated. . . '". Vasquez at 620. Vasquez defeats, rather than supports petitioner's claim.

Petitioner's false claim that the statutory scheme at the time of his trial, effectively excluded most blacks from jury service is also controlled by Duren v. Missouri, 439 U.S. 35 (1979) and McCleskey v. Kemp, 107 S. Ct. 1756 (1987). In order to challenge the composition of his jury under the Sixth

Amendment fair-cross-section requirement, petitioner was required to show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren at 364. Petitioner never proffered to any court any numerical proportions of blacks to non-blacks in Davis and Weber Counties, or any numerical proportions of blacks to non-blacks in Davis and Weber County juries, and thus never met the second prong of Duren. He merely does again what he has done throughout the appeals and post-conviction process; he states conclusions he thought were facts (and in this instance, clearly erroneous facts), conveniently argues from his conclusions relying on them as statements of fact, and asks the courts to agree. That the courts have not granted the relief petitioner has sought is simply proof that every court that has dealt with petitioner's claims has seen through this slight of hand.

Not only did petitioner fail to show that blacks were unrepresented in Davis and Weber County jury panels, he failed to show in any proffer that their alleged underrepresentation was the result of systemic exclusion. In McCleskey, this Court explained that in alleging systemic discrimination, a petitioner must allege intent to discriminate:

> He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

McCleskey at 1769, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (footnote and citation omitted). Under that standard, petitioner failed to state a claim. Even if his allegations were accepted as true,

because he failed to allege legislative intent to discriminate in the non-existent jury selection statute, McCleskey and Feeney foreclose his argument.

Petitioner expected the lower court to accept his conclusory allegation of systemic barring of blacks from jury service without petitioner's providing any statistical proof that the proportion of whites to blacks on the jury did not correlate with the proportion of whites to blacks in the overall population. Petitioner implies that all-white juries are incapable of treating black defendants fairly, but fails to show that any juror who convicted and sentenced him was racially motivated. This vague and conclusory allegation did not merit an evidentiary hearing under Price v. Johnson, 334 U.S. 266 (1948); Machibroda v. United States, 368 U.S. 487 (1973); Fontaine v. United States, 411 U.S. 213 (1973); and Blackledge v. Allison, 431 U.S. 63 (1976).

3. THE ONLY BLACK IN THE VENIRE WAS NOT EXCLUDED FROM THE JURY BY THE PROSECUTOR'S PEREMPTORY CHALLENGE.

Petitioner's allegation that the prosecution intentionally barred blacks from participating on the jury is also disproved by the record. Nothing in the record indicates that Ms. Zecker, the juror mentioned in petitioner's allegation, was black. The prosecutor challenged her for cause because she was religiously unable to impose the death penalty (1113, 1121),[42] but after some dispute, the trial judge accepted her as a legal juror (1179).

Prospective juror Lords was black (271), and although he admitted to having close ties in the black community where the crime occurred (277) and admitted that his father was the city director of the NAACP (278), the prosecutor passed him for cause (284), while defense counsel challenged him for cause (282, 284). After hearing arguments from defense counsel, the prosecutor

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[42] A prospective juror may be challenged for cause if his convictions about the death penalty will substantially impair his performance a a juror. Lockhart v. McCree, 476 U.S. 162 (1986). Thus, if Batson v. Kentucky, 106 S. Ct. 1712 (1986), were applied to this case, the prosecutor had a neutral reason for challenging this juror. See Batson at 1725.

expressed concern about avoiding reversible error, and joined the defense attorneys in a stipulation to excuse Lords from service (282). This again, is an example of petitioner's repeated mischaracterization of facts which are readily discoverable from the record. Thus, there was no Batson error here. Moreover, Batson has no retroactive application to cases already final. Allen v. Hardy, 106 S. Ct. 2878 (1985).

4. PETITIONER MADE NO PROFFER BELOW THAT THE JURY IN THIS CASE WAS AFFECTED BY ANTI-BLACK RELIGIOUS CONVICTIONS. NOR DOES THE RECORD SUPPORT SUCH A CLAIM.

In his proffer to the District court, petitioner claimed without citing numbers or statistics that in Utah's history of capital cases, most jurors have been members of the L.D.S. Church. He proffered no evidence of the religious affectations of his jurors.[43] His present claim, raised for the first time on certiorari[44] that the members of his jury were mostly L.D.S., and affected by religious anti-blacks sentiments, is a bold misstatement, unsupported by fact, and is disproved by the record. Not only did the jury fail to convict black co-defendant Roberts, but during the voir dire several jurors responded negatively when they were asked if their religious or fraternal affiliations would prejudice their performance as jurors (161, 238-39, 261-62, 778). Only one juror identified himself as belonging to the L.D.S. Church and he stated that his religious perspectives would not prejudice his performance as a juror (839).

Petitioner's belated claim of religious-racial prejudice, like his other claims, fails to meet the requirement of being case-specific. He implies that jurors living in an area

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[43] During summation at sentencing, however, petitioner's counsel expressly stated "We didn't ask you [the jurors] when we voir dired the jury, what religion you belonged to, and I don't know, but I would assume some of you are Christians, some of you may not be" (4298).

[44] See n. 14. In his second amended petition to the District Court, petitioner merely asserted as part of his systematic race discrimination claim that "In every capital case in the State of Utah . . . the sentencing jurors have been white, and most have been members of the Church of Jesus Christ of Latter Day Saints." He offered no facts specific to his own case as to the religious makeup of the jury. See Andrews' Second Am. Pet., paragraph 16E, at 21 (attached as Appendix C).

populated by members of what he simply concludes is a racist church are incapable of treating black defendants fairly, but failed in any proffers to show that any juror who convicted and sentenced him was committed to or affected by any religious doctrine. He also failed to proffer any data regarding purported doctrines of the L.D.S. Church. He offers limited data for the first time on certiorari. Petition at 8 n. 3. See n. 44, supra.

He cites Turner v. Murray, 476 U.S. 1 (1986) for the proposition that the District Court should have granted him a hearing. In Turner, this Court vacated the petitioner's death sentence because the voir dire of his jury was inadequate: the trial judge refused to ask specific questions regarding racial prejudice. This Court explained that capital defendants have no standing to complain of the absence of race-specific questions during voir dire unless the trial court refuses their specific requests that such questions be asked. In this case, petitioner's attorney was allowed to voir dire the jurors directly, and thus petitioner has no standing to challenge the voir dire. The judge did not refuse race-specific questions, but asked them personally, as did the prosecutor and defense attorneys.

5. THE NAPKIN INCIDENT WAS PROPERLY DEALT WITH BY THE TRIAL COURT AND WAS INSUFFICIENT, IN THE CONTEXT OF THE ENTIRE RECORD, TO RAISE A REASONABLE POSSIBILITY THAT THE JURY'S VERDICT WAS BASED ON ANTI-BLACK COMMUNITY SENTIMENT.

As noted above, the jury's failure to convict and sentence to death petitioner's black co-defendant, Roberts, disproves petitioner's claim that the jury was acting on racial prejudice, rather than on evidence. Inasmuch as the transcript of the napkin incident effectively rebuts petitioner's new and unsupported contention that all of the jurors may have seen the napkin (R. 2450), the unanimous jury verdict convicting petitioner further serves as a record-based rebuttal to the allegation that the jury's exposure to the napkin prejudiced petitioner's case.

Petitioner now objects to the trial court's treatment of the napkin incident, decrying the judge's failure to question jurors about the incident and his "general' and "vague" directive

to the jurors to "ignore communications from foolish people." Petition p. 10. Questioning individual jurors is not mandated in every case of juror contact with outside prejudice,[45] and there can be no doubt that the jurors who did see the napkin knew what the trial court was referring to in his admonition, which immediately followed the incident (2456).

Petitioner did not request a hearing with the jurors at the time of trial. This Court has previously held that belated allegations of implied juror bias such as this one will not be accepted when the defendant had the opportunity but failed to show actual prejudice. See Smith v. Phillips, 455 U.S. 209, 216 (1982) ("The Court rejected this claim of implied bias, noting that Dennis was 'free to show the existence of actual bias' but had failed to do so," quoting Dennis v. United States, 339 U.S. 162, 171-72 (1950)).

Petitioner cites Tanner v. United States, 55 U.S.L.W. 4942 (1987); Smith v. Phillips, and Remmer v. United States, 347 U.S. 227 (1954) in claiming that the napkin incident called for an evidentiary hearing. In Tanner this Court upheld the lower court's refusal to grant an evidentiary hearing to investigate allegations of juror drug use and inebriation. In Smith, a juror submitted an employment application to the District Attorney's Office during the course of the trial. When the prosecuting attorneys became aware that their applicant was also serving as a

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[45] United States v. Albert, 595 F.2d 283 (5th Cir.), reh'g. denied, 599 F.2d 449, cert. denied, 444 U.S. 963 (1979), explains that:

> Prejudicial private communications between jurors and third persons are, of course, prohibited . . . However, if, by means of a hearing or other investigation by the trial court, the private communications are shown to be harmless, a new trial is not required.

Id. at 290 (emphasis added).

Petitioner's claim for a post-trial evidentiary hearing to inquire into the prejudicial impact of the napkin incident on the deliberations of the jury flies in the face of "'controlling considerations of public policy,' . . . [which] dictate that jurors 'cannot be called . . . to testify to the motives and influences that led to their verdict.'" McKleskey v. Kemp, 107 S. Ct. 1756, 1765 (1987), quoting McDonald v. Pless, 238 U.S. 264, 267 (1915) and Chicago, B. and Q. R. Co. v. Babcock, 204 U.S. 585-93 (1907).

juror in one of their cases, they elected not to contact the juror and not to inform the trial court. In this case, the issue did not involve personal juror and prosecutor interest, as it did in Smith, and the defense, prosecution, and the court were all aware of the incident.

In Smith, this Court explained that in Remmer, a juror was offered a bribe by a third party in exchange for a verdict, and the trial judge and prosecutor failed to inform defense counsel of the incident and F.B.I. investigation. The Court based its decision on the seriousness of the bribe and the impact that the secrecy of the investigation must have had on the juror. Smith, 455 U.S. 215. In this case, the message on the napkin did not involve personal juror interest, and the investigation ended when all of the jurors were instructed to examine their place settings for other messages (2451), and they were subsequently instructed to ignore foolish communications (2456).

Petitioner's reliance on Batson v. Kentucky, 476 U.S. 79 (1986); Turner v. Murray, 476 U.S. 1 (1986); and Ristaino v. Ross, 424 U.S. 589 (1976) is also misplaced. These cases all deal with racial considerations in jury selection.

The napkin incident, petitioner's only factual allegation specific to his trial presented to the lower courts, was considered at the trial immediately after the incident when the bailiff was interviewed (2445-57), in motions for mistrial (2455, 3252), and on direct appeal.[46] In denying petitioner's request for an evidentiary hearing, both the District Court and the Tenth Circuit took note of the Utah courts' dispositions of

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46 State v. Andrews, 576 P.2d 857 (Utah) cert. denied, 439 U.S. 882 (1978):

> We conclude that no actual prejudice was demonstrated showing that the jury was influenced adversely and there was no showing that sequestration would have eliminated this incident. Indeed though the jury was not generally sequestered, it was sequestered at this recess. We believe that the professional manner in which this unfortunate incident was handled by the jurors, the bailiff, and the court negates the probabilty of actual prejudice.

Id. at 859.

these issues,[47] which are entitled to a presumption of correctness.[48] Because the merits of petitioner's napkin incident allegation were adjudicated fully and fairly in the state courts, there was nothing to merit a further evidentiary hearing in federal habeas corpus proceedings.[49]

6. PETITIONER'S CLAIM OF DISPROPORTIONATE IMPOSITION OF DEATH PENALTY ON BLACK DEFENDANTS FAILS UNDER McCLESKEY.

In order to avoid the impact of the Court's decision in McCleskey, petitioner recharacterizes his statistical argument for racial conviction and sentencing, claiming that he does not seek to establish discrimination itself, but seeks to show that the entire capital sentencing scheme in Utah fails to protect defendants from discrimination. See Petition at 11, n. 5. His statistics supposedly demonstrate that juries are racially motivated, but petitioner's recharacterization of his argument is a distinction without a difference. Aside from citing a nonexistent statute, petitioner does not identify any part of the capital sentencing system that, if changed, would have prevented his jurors from convicting and sentencing him. In any event, this Court rejected a similar argument in McCleskey:

> In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of appeals, and every other court that has considered such a challenge, that his claim must fail.

Id. at 1766.

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[47] Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984); Andrews v. Shulsen, 802 F.2d 1256.

[48] 28 U.S.C. § 2554(d); Sumner v. Mata, 449 U.S. 539 (1981); Patton v. Yount, 467 U.S. 1025 (1984); Ball v. Ricketts, 779 F.2d 578 (10th Cir.), cert. denied, 107 S. Ct. 236 (1986); Maes v. Patterson, 401 F.2d 200, 201 n. 4 (10th Cir. 1968); Hurt v. Page, 355 F.2d 169, 170 (10th Cir. 1966); Townsend v. Sain, 372 U.S. 293, 318 (1963); Wainwright v. Witt, 469 U.S. 412 (1985).

[49] 28 U.S.C. § 2254(d); Maxwell v. Turner, 411 F.2d 805, 807 (10th Cir. 1969); Sumner v. Mata, 449 U.S. 544, 547 (1981); Jolly v. Crouse, 411 F.2d 808, 809 (10th Cir. 1969).

In similar fashion, petitioner claims that his proffer of statistical proof differed from McCleskey's because his own statistics showed a pattern of discrimination against black defendants. The Baldus study used by McCleskey "divided the cases according to the combination of the race of the defendant and the race of the victim." McCleskey at 1763. The district court and circuit court evaluating McCleskey's claims dealt with both the race of the defendants and the victims, id. at 1764, 1765. This Court summarized McCleskey's claims thusly:

> He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers.

Id. at 1766.

Regardless of petitioner's insistence on characterizing his statistical argument as one focused on the system, see n. 23, he implies that statistics[50] about defendants convicted and sentenced in other cases could be used to show that his jurors acted in accordance with a trend of racial prejudice, but he failed in every proffer to show that he could prove that his jurors were actually motivated by racial considerations. Historically, lower courts have not accepted similar statistical proof of discrimination, holding that statistical proof of discrimination can substitute for a habeas corpus petitioner's normal burden of alleging case-specific facts only when those statistics give rise to only one inference.[51] Even under less restrictive Tenth Circuit standards, i.e. recognizing as valid

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[50] The District and Circuit Courts found petitioner's statistical proof wanting in both legal and scientific ways. See Andrews v. Shulsen, 600 F.Supp. at 426; Andrews v. Shulsen, 802 F.2d at 1269-70.

Compare the complex analysis involved in the Baldus study described in McCleskey at 1763-64 with the materials proffered by petitioner. See also Affidavit of Dr. Harry E. Bluhm (offered by the State on rehearing in the Tenth Circuit and attached as Appendix D) for discussion of the scientific and ethical shortcomings of petitioner's attempt at statistical argumentation.

[51] Moore v. Blackburn, 806 F.2d 560, 564 (5th Cir.) cert. denied, 107 S.Ct. 1988 (1987); Watson v. Blackburn, 798 F.2d 872 (5th Cir.), cert. denied, 107 S.Ct. 1984 (1987); Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir.), cert. denied, 459 U.S. 882 (1982); Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

Eighth Amendment claims statistical patterns of discrimination when the statistics give rise to more than one inference,[52] petitioner failed to state a claim.

Semantics aside, petitioner's claim that his statistics support a challenge to the capital punishment system in Utah is controlled by McCleskey, which "rejected the argument that 'a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that . . . [a] capital sentence is unconstitutional under the Eighth or Fourteenth Amendments.'" Petition for Certiorari p. 6, quoting McCleskey v. Kemp, 107 S. Ct. 1756, 1761 (1987).

In summary, presumptions of state fact-finding validity in habeas cases reflect deference for principles of comity.[53] This Court rejected McCleskey's statistical challenge to his sentence because he was attacking "decisions at the heart of the State's criminal justice system. '[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through

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[52] The Tenth Circuit did not specifically delineate their standard for accepting statistical arguments:

> We need not decide precisely what degree of disparate impact would warrant condemning a capital punishment system because Andrews has not made a sufficient showing to call into question the overall fairness of the statutory scheme under which he received the death penalty. Constitutionally adequate procedures to direct and limit discretion in imposing the death penalty raise a presumption that a capital punishment law operates evenhandedly. . . . This presumption must be rebutted by proof of either random or systematically disparate sentencing patterns. Such proof should generally consist of an appropriately formal study that generates statistically significant results while accounting for the effect of other causal variables.
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> . . . .
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> [A] small population is not the only problem with Andrews' proffer. He has not developed the evidence that is available so as to provide some factual basis for relief. More importantly, Andrews has failed to address whether other causal factors, such as the degree of aggravation involved in the murders, might account for the sentences of the seven individuals now on Utah's death row.

Andrews v. Shulsen, 802 F.2d 1256, 1269.

[53] See Sumner v. Mata, 101 S. Ct. 764 (1981) ("This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts," id. at 769.

criminal laws against murder.'" McCleskey at 1769, quoting Gregg v. Georgia, 428 U.S. 153 (1976). Inasmuch as the lower federal courts relied heavily on state court adjudication of two of petitioner's allegations raised in his habeas petition, if this Court were to grant certiorari in this case, it would send a signal to other federal courts that they should independently evaluate all state court findings of fact, resulting in duplicative procedures and federal antagonism.[54]

Finally, in light of the jury's treatment of co-defendant Roberts, it is evident that the absence of blacks on the jury is not the best explanation for petitioner's conviction and sentence; overwhelming evidence at trial supported the jury's verdict of his guilt. Cf. McCleskey at 1769 ("a legitimate and unchallenged explanation for the decision is apparent from the record; McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty").

Contrary to his assertion, during the twelve years his case has taken to work its way glacially through the post-conviction process, petitioner had countless opportunities to make proffers of facts and evidence of sufficient quality and merit to get past what Townsend v. Sain requires before an evidentiary hearing is held. He has not made such a proffer because he could not. He has never been able to do anymore than offer conclusions and speculation masked as fact. As the State's reply demonstrates, petitioner has not been candid when it comes to the record, or the issues it applies in his case. The record and the law do answer his claims. They have always left him without a basis for relief despite what he has tried to do with

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54 In addition to minimizing the "friction" between the state and federal courts, the limited nature of the review provided by § 2254 also serves the interest that both society and the individual criminal defendant have "in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Sumner v. Mata, 101 S.Ct. 764, 771 n. 3 (1981), quoting Sanders v. United States, 373 U.S. 1, 34-35 (1963).

them. He has not done any better in his petition to this Court. He has offered no argument either on the facts or the law which would warrant this Court's consideration. The decision of the Tenth Circuit on the issues related to petitioners claims based on race, and the fairness of his overall trial should be allowed to stand.

B. PETITIONER IS PROCEDURALLY BARRED FROM LITIGATING HIS CLAIM OF RACE DISCRIMINATION IN HIS OWN CASE BECAUSE IT WAS NEVER PRESENTED TO THE STATE COURTS; PETITIONER IS ALSO PROCEDURALLY BARRED FROM LITIGATING HIS SYSTEMIC RACE DISCRIMINATION CLAIM BECAUSE HE WAS FOUND BY THE STATE COURTS TO HAVE PROCEDURALLY DEFAULTED THE CLAIM UNDER STATE LAW BY NOT TIMELY RAISING IT ON DIRECT APPEAL, AND BY PROVIDING THE STATE HABEAS COURTS WITH ONLY CONCLUSORY ALLEGATIONS IN SUPPORT OF THE CLAIM.

The Tenth Circuit, without distinguishing between petitioner's two distinct race discrimination claims, found that the Utah Supreme Court "considered the merits of the argument in the first state habeas case, notwithstanding the prior procedural default" (citing Andrews v. Morris, 607 P.2d at 822, 825). Andrews v. Shulsen, 802 F.2d at 1266 n. 8.

It then concluded that:

> If a state court has reached the merits of a claim, a federal habeas court may do the same despite the existence of a state procedural bar. See e.g., Morishita v. Morris, 702 F.2d 207, 209 (10th Cir. 1983); see also County Court of Ulster County v. Allen, 442 U.S. 140, 142-54, 99 S. Ct. 2213, 2219-23, 60 L.Ed. 2d 777 (1979).

Id. The Tenth Circuit first erred in applying this analysis to petitioner's claim of race discrimination specific to his own case because, as will be show infra, petitioner never asserted such a claim in the state courts. Secondly, the court misread the Utah Supreme Court's opinion in Andrews v. Morris, in concluding that it reached the merits of the systemic discrimination claim "despite the existence of a state procedural bar." That opinion reflects that the Utah Supreme Court expressly found and invoked Utah's doctrine of procedural default on the issue. 607 P.2d at 818-21. It then reached the merits only in the alternative as dictum. 607 P.2d at 825. The weight of authority is that in such instances, the door is not opened for federal habeas review.

1. PETITIONER NEVER PRESENTED THE STATE COURTS WITH HIS CLAIM THAT HIS CONVICTIONS AND DEATH SENTENCES WERE THE RESULT OF RACE DISCRIMINATION IN HIS PARTICULAR CASE.

Petitioner never asserted in the state courts that the jury's guilt and sentencing verdicts in his own case were the result of race discrimination.[55] Moreover, as previously shown, other than the single napkin incident, he never presented any of the other factual allegations he now offers in his petition for certiorari in support of his claim of racial bias.

At trial, he made no claim that the jury was in fact influenced by racial considerations. Specifically, he made no claim (1) that there was race bias in the local jury selection system; (2) that the prosecutor improperly used peremptory challenges to exclude blacks from the jury; (3) that the jurors were influenced by religious doctrines prejudicial to blacks or were in any way racially prejudiced against him; (4) that there were manifestations of anti-black community sentiment which influenced the jurors (other than the "napkin incident"); (5) that media reporting prior to or during trial had racial overtones or that jurors had actually been exposed to such improper media publicity or other improper influences,[56] or (6) that the atmosphere at the trial was racially charged. The claims raised at trial as to the fairness of the proceedings simply were not based upon racial allegations. Only questions of the need for change of venue, sequestration, or continuance due to general pretrial and trial publicity were raised.

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[55] Petitioner will likely argue that because he raised the napkin incident in state court, he preserved the race discrimination issue. However, petitioner offered the napkin incident as part of a separate claim that the trial court erred by failing to sequester the jurors to protect them from prejudicial outside influences. See Pierre's brief on direct appeal, Point V at 39 which Andrews' joined (attached as Appendix E). Petitioner never claimed, as he does now, that he was denied his rights under the Eighth and Fourteenth Amendments because the jurors in his case, in fact, acted out of racial bias, nor did he offer the napkin incident in support of such claim.

The Utah Supreme Court accordingly only dealt with the issue in the context of the sequentation issue and determiend that because the incident occurred during the jury's joint luncheon recess, "sequestration would not have eliminated this incident. Indeed though the jury was not generally sequestered, it was sequestered at this recess. State v. Andrews, 572 P.2d at 859.

[56] See discussion of the what petitioner alone characterizes as the "black power" gesture article, in Point I. A. supra at n. 31.

On direct appeal, the fairness of the trial issues were again framed by Andrews and his co-defendant only generally and they never cited facts to support a claim of juror bias based upon race. See Pierre's Brief on direct appeal, Points V and VI at 32-42 which Andrews joined (attached as Appendix E), and Andrews brief on direct appeal Points I and II at 3-7 (attached as Appendix F) and both appellants' petitions for rehearing in said cases (attached as Appendix G). Accordingly, the Utah Supreme Court addressed the issues only generally with no reference to race as an issue. See State v. Pierre, 572 P.2d at 1348-50; State v. Andrews, 574 P.2d at 710; and State v. Andrews, 576 P.2d at 858-59.

On state habeas corpus, Andrews' petition merely reiterated the same factors he had previously asserted both at trial and on appeal with no supplemental reference to new evidence that race played any role in his particular case. (He raised only the systemic discrimination claim.) He added one conclusory allegation that there were "strong racial feelings that surrounded the trial" but he provided no specifics beyond the napkin incident. See Andrews Am. Pet. 11/24/78, paragraph 11 at 3 (attached as Appendix B).[57] He proffered no additional evidence at the hearing on the respondents' motion to dismiss the petition, and he sought additional time for discovery (implying that he did not yet have data to support his conclusory allegation). See excerpts from transcript of 11/30/78 hearing at 9-10 (attached as Appendix H).

Petitioner's failure to raise the issue in state court procedurally defaulted the claim. The Utah Supreme Court has adopted a strict waiver rule for state post-conviction proceedings. It is well settled that a petitioner "cannot raise issues in post-conviction proceedings which could or should have been brought on direct appeal, except in unusual

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[57] Andrews was represented by his present counsel, Timothy K. Ford, at this and all subsequent stages of this case.

circumstances."[58] Robbins v. Cook, 737 P.2d 225 (Utah 1987) (citing Codianna v. Morris, 660 P.2d 1101 (Utah 1983)). "A collateral attack by way of habeas corpus may not be utilized as a substitute for, or a duplication of a direct appeal." Andrews v. Morris, 607 P.2d at 819. And the state supreme court has strictly applied the waiver rule to bar subsequent post-conviction petitions which raise issues which should have been brought in earlier petitions. Robbins v. Cook II, Ut. Sup. Ct. No. 870134 (May 29, 1987) ("The issues raised by [petitioner] either were or should have been brought on direct appeal or on his previous writ of habeas corpus and cannot be brought at this time)." (Emphasis added.) (A copy of the court's minute entry is attached as Appendix I). See also Utah's Post-conviction Remedy Rule, Utah R. Civ. Proc., Rule 65B(i)(2) ("if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionally of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint ... and no further proceedings shall be had on such complaint," and "(4) all claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.").[59] Thus, petitioner has procedurally defaulted any available remedy he may have had on this claim in the state courts.

Pursuant to federal law, "[w]hen a procedural default bars litigation of a constitutional claim in state court, a state

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58 "Unusual circumstances" include situations where it would be "unconscionable not to reexamine the conviction." Andrews v. Morris, 607 P.2d at 820, citing Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968, 969 (1968).

59 Federal courts follow a similar rule, holding that raising issues in a successive habeas petition that were not raised in a previous petition constitutes an abuse of the writ which requires dismissal of the petition. E.g. Straight v. Wainwright, 106 S. Ct. 2004 (1986); Antone v. Dugger, 465 U.S. 200 (1984); Woodard v. Hutchins, 464 U.S. 377, 397-78, 380 (1984). In re Shriner, 735 F.2d 1236 (11th Cir. 1984); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1984). See also 28 U.S.C. § 2244(b); Rule 9(b) of Rules Governing Section 2254 cases in the United States District Courts.

prisoner may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" Reed v. Ross, 468 U.S. 1, 11 (1984) citing Engle v. Isaac, 456 U.S. 107, 129 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioner, on federal habeas corpus, never attempted to establish cause and prejudice for his earlier state procedural default.[60] Moreover, any such attempt would have failed under the facts of this case. This Court has declined to provide a comprehensive catalog of the circumstances that would justify a finding of cause. Smith v. Murray, 106 S. Ct. 2661, 2666 (1986). However, "[t]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Murray v. Carrier, 106 S. Ct. 2639, 2641 (1986). Petitioner also could hardly have relied on the novelty of the claim as cause. In Reed v. Ross, 468 U.S. 1 (1984), this Court stated that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." Id. at 16. But "the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S. Ct. 2661, 2667 (1986). See also Loggins v. Lockhart, 822 F.2d 764 (8th Cir. 1987). Additionally, cause does not exist when "various forms of the claim . . . [have] been percolating in the lower courts . . ." Smith v. Murray, 106 S. Ct. at 2667. This issue of race discrimination in his own case was clearly foreseeable. Cf. Spinkellink v. Wainwright, 578 F.2d 582, 614-15.

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60 Petitioner failed to even assert in his initial federal petition the claim that race discrimination had occurred in his particular case. See Andrews Am. Pet., Nov. 1980, paragraph 13 at 7-9. Respondents moved to dismiss that petition in part, on the theory that unless petitioner pointed to specific acts of discrimination in his case, mere systemic challenges of discrimination should be rejected as a matter of law. Respondents' motion to dismiss memorandum. January 6, 1981 at 79-8[illegible] (Vol. II, 90).

It was not until he filed his second amended petition in 1984, that he began to frame the issue asserting the various conclusory allegations of race discrimination, specific to his own case, which he reasserts but embellishes in his petition for certiorari. See Point I. A., supra.

However, as this Court stated in Smith v. Murray, 106 S. Ct. at 2668, the determination that petitioner has failed to show cause for not raising the issue at an earlier time does not end the inquiry. "[']In appropriate cases the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamental unjust incarceration.'" Murray v. Carrier, 106 S. Ct. at 2650. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Id. at 2650.

In the instant case the application of the cause and prejudice test to this issue will not result in a "fundamental miscarriage of justice," Engle v. Isaac, 456 U.S. at 135, because overwhelming evidence was presented at trial of petitioner's guilt. Also, the fact that petitioner's co-defendant, Keith Roberts, also a black and also charged with the murders, was not convicted of murder belies petitioner's claim that Andrews was convicted and sentenced to death merely because he was black. Without deciding the question of cause, this Court may conclude, therefore, that petitioner suffered no actual prejudice from the individualized racial bias he claims existed at his trial.

2. PETITIONER'S SYSTEMIC DISCRIMINATION CLAIM WAS FOUND TO BE PROCEDURALLY DEFAULTED BY THE STATE COURTS.

At trial, Andrews raised no claim of systemic race discrimination in Utah because he and his co-defendants were the first to be tried under Utah's 1973 death penalty statutes. However, he did not raise the issue at any time during the long course of his direct appeal which did not finally conclude until January 17, 1978, well over three years after his conviction and sentencing. State v. Andrews, 576 P.2d 857, 858 (Utah), (supplemental opinion on rehearing), cert. denied, 439 U.S. 882 (1978).

Petitioner first raised the claim four years after his conviction in his first state habeas corpus action filed in November, 1978. The allegations in paragraph 12 of his amended petition, however, were wholly conclusory. He sought time for discovery and funds to secure expert testimony (implying that statistical data had not yet been assembled in support of his petition). See Andrews' Am. Pet. 11/24/78, paragraph 12B at 8-9, 11 (attached as Appendix B). At the hearing on responderts' motion to dismiss the petition, Andrews' co-petitioner, Selby, merely alluded to one factually dissimilar case where a death sentence had not been given and indicated there were at least six others "where capital exposure was had" but "was relieved for whatever reason." Neither he nor Andrews proffered sufficient evidence to indicate systemic discriminatory action. They proffered no statistical study, formal or otherwise, on capital sentencing in Utah or elsewhere to support their request for an evidentiary hearing on the claim. See excerpts from transcript of 11/30/78 hearing at 11-12, 16-18, 28-29 (attached as Appendix H). The court dismissed the issue on the grounds that it could or should have been raised on direct appeal, that no developments of fact or law had occurred since the filing of petitioner's direct appeal, and that the claim failed to state a claim on which relief could be granted or on which a hearing need be held. The court's findings and conclusions are set forth in full in Andrews v. Morris, 607 P.2d 817, 819-20.

The Utah Supreme Court, in Andrews v. Morris, 607 P.2d at 821, affirmed. A close reading of the overall structure and substance of that opinion establishes that the court found the claim to have been procedurally defaulted on two grounds, and only addressed the merits of the claim in the alternative as dictum.

First, the opening four pages of the opinion set forth the lower court's findings and a detailed analysis of Utah's

doctrine of procedural bar which the court found consistent with similar federal doctrines. 607 P.2d at 818-21. The court observed that:

> In his argument to the court below, Andrews delineated the issue presented as whether or not new, significant developments of fact or law have occurred since the taking of the direct appeal which have created issues that should now be litigated and which would not have been litigated in prior proceedings.

Id. at 818. The court continued:

> Andrews first contends that the trial court erred in failing to determine which of his constitutional claims were new, whether any of them had been waived, and which of them were based on new facts or law not available at the time of his direct appeal. In light of our discussion of this matter in the proceeding paragraphs, and in further light of our discussion of the findings and conclusions of the trial court hereinabove recited, we deem this contention to be without merit.
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> . . .
>
> [I]n light of the long established doctrine of waiver, the trial court was clearly and simply called upon to determine whether the issues raised in the petition were or could have been raised on appeal. . . . and our review [of the pleadings and documents of record] causes us to conclude that the court did not err in dismissing the petition.

Id. at 822. It concluded that:

> Andrews clearly had the burden of showing why the issues could not have been raised on appeal. In this regard his petition was deficient and thus failed to state a claim.

Id. at 821.

Secondly, the court found that dismissal of the petition was proper because petitioner had procedurally failed to comply with Utah's postconviction remedy rule with respect to the claim because his allegations were conclusory:

> We note initially that the petition for relief is drawn in conclusional language and is lacking in factual data to support the allegations, contrary to the mandate of said Rule 65B(i), which reads, in pertinent part as follows:
>
> (2) The complaint [petition] . . . shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any Constitutional rights were violated. The

> complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations.
>
> In fact the petition seeks "adequate" time for briefing, discovery, and preparation for a hearing thereon . . . .
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> In the instant case, the hearing on the motion to dismiss was held on November 30, 1978, some twelve months after the November 25, 1977, affirmance of the conviction and sentence on direct appeal. We deem that to be adequate time to assemble all pertinent data for postconviction proceedings.

Id. at 821.[61]

Third, in the alternative, the court affirmed the dismissal of the petition on the ground that such systemic challenges could be dismissed as a matter of constitutional law (adopting the reasoning of Spinkellink v. Wainwright, 578 F.2d 582. Id. at 825. See also companion case of Pierre v. Morris, 607 P.2d at 814-15 (systemic racial bias claim one of law that could have been raised on direct appeal but was not was waived; no issues that render it wholly unconscionable not to reexamine regardless of waiver).

The Tenth Circuit reached the systemic race discrimination issue on the theory that because the state courts had reached the merits of the claim in the alternative, the door was opened for federal review (citing Morisbito v. Morris, 702 F.2d 207, 209 (10th Cir. 1983). The weight of authority in other

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[61] Petitioner filed a successive habeas corpus petition with the Utah Supreme Court which was denied in Andrews v. Morris, 677 P.2d 81 (Utah 1983). His petition contained a variation on the systemic race issue in the context of how the Wood-type standard had been applied in the trial courts in cases involving white defendants. He attached affidavits in support of this issue. Again, his proffer was found to be clearly deficient to support his claims. Andrews v. Morris, 677 P.2d at 97. In his petition for rehearing in that case at 5, (Vol. XIV), he attempted to excuse the inadequacy of his proffered evidence by blaming the court:

> Petitioner has . . . not again proffered the evidence this court refused to hear in Andrews v. Morris, 607 P.2d 816, 825 (Utah 1980), regarding the arbitrary and racially discriminatory manner in which the death penalty had been imposed throughout the State of Utah, and the particular evidence of discrimination against petitioner in this case. That evidence has been gathered for a hearing in federal court--and petitioner remains willing to present it in state court; but this court has refused to hear it.

(As previously shown, petitioner failed to even proffer it when he returned to federal court).

circuits, however, is that procedural bar to federal review on the merits still applies. See Phillips v. Smith, 717 F.2d 44, 47-51 (2d Cir.), cert. denied, 465 U.S. 1027 (1984) citing Michigan v. Long, 463 U.S. 1032 (1983); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 439-40 (3d Cir. 1982) (state court reliance on procedural bar as an alternative holding suffices to bar federal habeas review; those interests that justify adoption and enforcement of procedural rules are equally present whether or not a decision based on procedural default is followed by a discussion on the merits; a state court may reach the merits of a claim merely to give guidance on a difficult and unsettled issue of law or to show its decision grounded on procedure is not unfair); Thompson v. Lynaugh II, 821 F.2d 1080, 1081-82 (5th Cir. 1987); Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), cert. denied, 444 U.S. 868 (1979); Hockenbury v. Sowders, 620 F.2d 111 (5th Cir.), reh'g denied, 633 F.2d 443 cert. denied, 450 U.S. 933 (1981) (where procedural default was a "substantial basis" of the state court's denial of relief, federal court barred from reaching merits); United States ex rel. Veal v. DeRoberts, 693 F.2d 642, 650 (7th Cir. 1982); Dietz v. Solem, 640 F.2d 126, 131-32 n. 1 (8th Cir. 1981) (state courts may choose to reach merits in dictum, yet invoke procedural default which bars federal habeas review on merits); Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983) 468 U.S. 1220, cert. denied, 104 S. Ct. 3591 (1984).

In summary, because petitioner's claims of individual and systemic racial bias were found to be procedurally defaulted by the State courts, the Tenth Circuit should not have reached these issues. Reed v. Ross, 468 U.S. at 11 (procedural default of claim in state court bars federal habeas review absent showing of cause and prejudice). This is especially true in light of the conclusory manner in which petitioner has continually framed these issues. Petitioner failed to adequately demonstrate cause and prejudice sufficient to warrant review in federal court of these issues. This Court should, therefore, deny certiorari.

II.

THE TENTH CIRCUIT PROPERLY APPLIED THE CONTROLLING DECISIONS OF THIS COURT IN FINDING THAT ANDREWS' DEATH SENTENCE WAS PROPORTIONATE PUNISHMENT UNDER THE PRINCIPLES OF ENMUND V. FLORIDA, 458 U.S. 782 (1982) AND CABANA V. BULLOCK, 474 U.S. 376 (1986), AND PROPERLY DENIED REHEARING ON PETITIONER'S CLAIM THAT TISON V. ARIZONA, 107 S. CT. 1676 (1987) REQUIRED A REMAND OF HIS CASE TO THE STATE COURTS FOR A REDETERMINATION OF THE EXTENT OF HIS CULPABILITY.

The Tenth Circuit, after reviewing Utah's capital murder statutes, the jury instructions given in this case, the record evidence of Andrews' involvement in the crimes, and the theories asserted by Andrews' trial counsel in his arguments to the jury, Andrews v. Shulsen, 802 F.2d 1256, 1272-75 (10th Cir. 1986), determined that "[t]his case was tried and presented to the jury on a theory of intentional or knowing murder rather than felony murder." Id. at 1272.[62] It found that the jury was instructed that "a party must act with the same mental state as that required for commission of the murder, including intent, and

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[62] This Court has repeatedly recognized that Utah's first degree murder statute requires a showing of intentional or knowing murder, and not mere straight-felony merder. Enmund v. Florida, 458 U.S. 782, 789-90 n. 7 (1982); Tison v. Arizona, 107 S. Ct. 1686 n. 10 (1987). Indeed, the Tison Court recognized Utah's statute also does not allow a death sentence for felony murders involving lesser culpable mental states or for mere showing of defendant's substantial involvement in the felony. Id. In its Eighth Amendment analysis, the Court included Utah's system among those at the opposite end of the spectrum from states which allow the death penalty for felony-murder simpliciter ("solely for participation in a robbery in which another robber takes a life," with no requirement of a culpable mental state). Id. at 1682, 1684. Utah was grouped among the small minority of states which require the highest degree of mental culpability (intentional or knowing) before the death penalty can be exacted. Id. at 1685-86, 1688. Utah was not among the majority of jurisdictions, as was Arizona, which fall somewhere in the middle of the spectrum ('mid-range felony-murder cases") authorizing the death penalty for felony-murder where the defendant's mental state falls short of intent to kill and/or where the extent of a defendant's participation in the felony is merely taken into account. Id. at 1685-86. Indeed, Utah's system not only requires the highest culpable mental state, but also takes into account the degree of a defendant's participation by recognizing as a statutory mitigating factor whether "[t]he defendant was an accomplice in the murder committed by another person and his participation was relatively minor." Utah Code Ann. § 76-3-207(2)(f) (Supp. 1986) (formerly § 76-3-207(1)(f) (1973), in effect at the time of Andrews' trial). This latter feature alone, without an added mens rea requirement, would qualify Utah for inclusion in the Court's "mid-range felony-murder" listing and out of the felony-murder simpliciter categorization. 107 S. Ct. at 1686-87. But, Utah has both features, thus placing it perhaps at the top of the highest end of this Court's spectrum, demanding the greatest showing of culpability for death sentencing anywhere in the country.

that Andrews must have acted with knowledge that his acts were furthering a deliberate homicide." Id. at 1273. Also, the instructions "clearly required the jury to find that Andrews knew of the impending murders and that he had the same intention to kill as Pierre", and that "Andrews' physical withdrawal from the basement was done with the understanding that Pierre fully intended to kill the victims that he, Andrews, had just helped to capture, bind, poison, and rob." Id. at 1274.[63] Cf. Utah Code Ann. § 76-5-202 (1973) (Appendix A) and Instruction Nos. 8, 12-14 (Appendix J). Accordingly, the Tenth Circuit found that Andrews' death sentences comported with the requirement of Enmund v. Florida, 458 U.S. 782, 797, 799, 801 (1982) and Cabana v. Bullock, 106 S. Ct., 689, 693, 697 (1986), that the record establish a finding that the defendant either killed, attempted to kill, or intended that a killing take place or that lethal force would be employed.[64]

The Tenth Circuit's findings and conclusions are consistent with those of every court which has reviewed this case. See Andrews v. Shulsen, 600 F. Supp. 408, 430-31. Andrews v. Morris, 607 P.2d 816, 824, and 607 P.2d at 826 (Stewart, J. concurring); State v. Andrews, 574 P.2d 709, 710-11; and State v. Pierre, 572 P.2d 1338 (companion case). Moreover, Andrews has previously petitioned this Court for certiorari asserting that he was not found to have intentionally or knowingly caused the death

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[63] Andrews claims that the Tenth Circuit's analysis "ignored" other plausible readings of the instructions including the theory that he could have been convicted of murder simply on the basis of an intent to help the murderer escape in conjunction with a failure to effectively withdraw from the crime. Petition at 21 n. 10. The Tenth Circuit did not "ignore," but fully analyzed and rejected this possibility, 802 F.2d at 1273-74, concluding that "the clear requirement of instruction 12 that a party must act 'with the mental state required for the commission of an offense' and 'with an intent that his act will further, or cause the crime to come about' negates the possibility that the jury could have convicted Andrews without also making the requisite finding that he intended the murders." Id. at 1274.

[64] The Tenth Circuit recognized Cabana's holding, 106 S. Ct. at 695-97, that a death sentence may rest upon a guilty verdict which necessitates a finding of intent, or upon appropriate factual findings made by a state trial judge or appellate court. 802 F.2d at 1272. In Andrews' case, Utah's statute and jury instructions necessitated a finding of Enmund-type intent, and, as will be shown, infra, the Utah Supreme Court made appropriate factual findings of such intent.

or another, and certiorari was denied on this issue. Andrews v. Morris, 449 U.S. 891 (1980).

Despite these repeated findings that the higher degree of culpability required by Enmund, Cabana, and Utah statutes, was established and found in this case, Andrews now attempts to bring his case within the parameters of Tison v. Arizona, 107 S. Ct. 1676 (1987)--a case which held the death penalty also appropriate for the less culpable defendant who neither intends to kill nor inflict the fatal wounds, but whose participation in a felony is major (substantial) and who exhibits reckless indifference for human life. 107 S. Ct. at 1688.[65] In Tison the Arizona Supreme Court, on collateral review, had interpreted the Enmund intent requirement as including situations where a defendant "contemplated or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." 107 S. Ct. at 1680-81. This Court found this to be an attempt to reformulate "intent to kill" as a species of foreseeability, and that this definition of intent is broader than what had been described in Enmund. Tison, 107 S. Ct. at 1684. However, this Court noted that the Arizona Supreme Court had found the Tison brothers' participation in events leading up to and following the murders "substantial," id. at 1680-81, but had not specifically addressed whether their actions displayed reckless indifference to human life--the second prong of the new Tison standard. The case was remanded for such a determination of the second requisite pursuant to Cabana, 106 S.

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65 Like Enmund and Cabana, and unlike the instant case, the Tisons were tried and their juries instructed on straight felony-murder and accomplice liability theories which allowed for a conviction of capital murder where a killing occurs during the perpetration of certain enumerated felonies, and each participant in the felony is deemed legally responsible for the acts of his accomplices without regard to his own mental state as to the killing. However, in imposing the death sentences on the Tisons, the sentencing judge additionally found their participation in the crimes giving rise to the felony murder rule "very substantial" and that each could "reasonably have foreseen his conduct... would cause or create a grave risk of ...death." 107 S. Ct. at 1680-81. The Arizona Supreme Court agreed and upheld the death sentences despite observing that the brotners did not plot to kill the victims, intend that the victims die, or actually pull the triggers. Id.

Subsequently this Court issued its opinion in Enmund.

Ct. at 695-97 (which allows such findings to be made by state appellate courts based upon the record), and as a matter of comity. It was in this context that Tison was remanded for further proceedings.

Thus, Tison does to suggest any need for remanding a case for determination of a defendant's culpability where a defendant, like Andrews, was tried and his jury was instructed on a theory of intentional or knowing killing as required by the state's first degree murder statute, and where the state courts have already found that the evidence in the record establishes the presence ot this higher mental state.[66]

Petitioner, through a very selective reading of only portions ot the Utah Supreme Court's opinion in State v. Andrews, 574 P.2d 709 (Utah), cert. denied, 439 U.S. 882 (1978), attempts to make it appear that the court applied the same "erroneous standard employed by the Arizona Supreme Court in Tison." Petition at 18, and that Tison thus requires that this case be remanded to the state courts for a redetermination of his level or culpability for these murders under the Eighth Amendment. Petitioner chooses to ignore other portions of tnat and other Utah Supreme Court opinions in his case containing additional facts and findings of intentional or knowing killing. The State v. Andrews opinion opens with a reference to the companion case of State v. Pierre, 572 P.2d 1338 (Utah 1977), where the reader is rererred to "the numerous facts, references, authorities and reasons of which are pertinent and controlling here." State v. Andrews, 574 P.2d at 709. The court stresses that "[f]acts, explanations, and other matters supplemental to those recounted in Pierre are stated in this opinion." Id. (emphasis is the

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66 Petitioner misleads this Court when he implies that the Tenth Circuit did not have the benefit of this Court's decision in Tison when it decided this issue. Petition at 21. While Andrews' petition for rehearing was still pending, Tison was decided. The Tenth Circuit ordered the parties to file supplemental briefs addressing the possible effects of Tison. Petitioner's brief contained claims similar to those in his petition for certiorari. Rehearing was subsequently denied.

court's).[67] The court then addressed "whether the sentence of death imposed upon the defendant should be vacated because it is disproportionate and excessive in relation to the offenses for which he was convicted and his involvement therein." 574 P.2d at 710. In determining this issue, the court reiterated:

> [T]his Court recited in detail in Pierre the nature and circumstances of the three murders. We have briefly supplemented here these recitals by enumerating the particularized characteristics of the defendant and his involvement in these murders. And we conclude that so far as the verdict of death is concerned, the evidence discloses overwhelmingly that the jury could reasonably and unarbitrarily find as it did; and after our review of the matter, we hold that because of defendant's involvement in these murders and his background and characteristics, disproportionality between the crimes of murder and the death sentence does not exist.

574 P.2d at 710-11 (emphasis added.) The court further observed that:

> Defendant's complicity in these murders was deep; his actions bold and gross. He indeed significantly aided in triggering a milieu that ended in catastrophe and death--and did so knowing at the beginning of this episode of terror that it would most probably conclude as it did.

574 P.2d at 711 (emphasis added).[68]

To fully understand the court's finding of Andrews "involvement" and "complicity in these murders," the facts relating to him enumerated in State v. Pierre, 572 P.2d 1338 (1977), necessarily must be considered as well. Those facts include:

(1) the victims were tied up and made to lie on the floor. Id. at 1343.

(2) they were "forced to drink liquid Drano...by the defendant in company with Andrews, who aided the defendant by pouring the caustic into a plastic cup for accomplishment of these violent acts." Id.

67 Thus, the facts petitioner quotes from State v. Andrews, 574 P.2d at 709, in his petition for certiorari at 19 are only the few facts the supreme court intended should supplement the far more detailed facts relating to Andrews found in the court's separate opinion in State v. Pierre.

68 This is the only portion of the Court's findings petitioner chooses to cite to this Court.

3. "the defendant and Andrews both had guns and defendant finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun which caused the deaths. Id.

4. "evidence further establishes that Orren and Stanley Walker were robbed in an aggravated manner of personal property in their possession...by the defendant, Andrews and Roberts." Andrews was inside the shop during the robbery. Id.

5. Andrews purchased the van used in the robbery. Id. at 1344.

6. Andrews had stated in February, 1974, that he would like to rob a hi fi shop and would kill anyone who got in his way. Id.

7. Andrews priced stereo items at the Hi-Fi Shop two days before the fatal day. Id.

8. Personal belongings of the victims were found next to the defendant's barracks as well as Hi-Fi Shop labels in Andrews' room and in a garbage can in the latrine of defendants' barracks. Id.

9. Michelle, Cortney and Stanley pled for their lives before the defendant and Andrews. Id.

More importantly, in State v. Pierre, which the State v. Andrews opinion merely supplements, the court observed that Utah's first degree murder statute "requires the actor to cause intentionally and knowingly the death of another under aggravating circumstances," and that "[f]irst degree murder in brief requires a conjoining of 'intentional and knowing' with enumerated facts." Id. at 1354. Thus, the Supreme Court had to find these elements to affirm both Pierre's and Andrews' convictions of first degree murder, as well as to sustain their

sentences in these companion opinions.[69]

Under Tison and Cabana, state court findings on a defendant's degree of culpability need not be limited solely to those made by the state court on direct appeal. Andrews' case was also twice reviewed by the Utah Supreme Court on collateral review. In Andrews v. Morris, 607 P.2d 816, Andrews had asserted under Lockett v. Ohio, 438 U.S. 586 (1978), that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant took a life or possessed a purpose (intended) to cause the death of the victim. The Utah Supreme Court responded that "[t]he facts in Lockett are to be contrasted with those of the instant case wherein Andrews was an active participant in acts of torture which preceded the final acts of murder." Id. at 824. The court alluded to the facts as to Andrews' participation in the events leading up to the murders which it had enumerated in State v. Pierre and concluded that:

> the instant case does not impose a 'purely vicarious theory of liability' as characterized by Justice Marshall in Lockett.
>
> We deem Lockett to be inapplicable...because Andrews' acts of participation were significantly different than Lockett's.

Id. Justice Stewart separately concurred that Utah law does not allow for a constructive intent or an imputed mens rea, and that juries must be instructed that persons not directly responsible for the actual killing must have had the purpose and intention that another be killed and the evidence must support that proposition. He then found that in Andrews' case:

> the trial judge instructed the jury with great care that the death penalty could be imposed only if the jury found that each defendant personally intended that one or more of the victims be killed. In my view the evidence in this case amply supports the implied jury finding that the appellant did in fact harbor such an intention.

[69] Indeed, were this court to remand this case now for an assessment of whether the lower degree of culpability announced in Tison is present for Eighth Amendment purposes, the defendant could only be convicted of second degree murder under Utah law. Utah Code Ann. § 76-5-203 (1978) lists reckless disregard for human life as murder in the second degree. Yet Andrews' trial counsel never sought an instruction on lesser included offenses at trial, and did not claim on appeal that such instructions should have been given.

Id. at 826.

Later, in Andrews v. Morris, III, 677 P.2d 81 (Utah 1983), in the appendix to the supreme court's unanimous opinion, the court factually found that Andrews and Pierre:

> held five people at gunpoint, all of whom were viciously tortured and seriously injured, one of whom was raped, and two [sic] of whom died as the result of their injuries. The victims were bound and imprisoned in the store's basement and were forced by both petitioners to drink a caustic chemical substance capable of causing their deaths. The State Medical Examiner testified that the substance would have caused the deaths of the murder victims but for the gunshot wounds they later sustained, and the death of the survivors but for the promptness of the medical attention given to them. Both petitioners covered the victims' mouths with tape after the administration of the caustic liquid.

Id. at 98. It further noted that Andrews also made no effort to halt the course of events which later transpired. Id.

Given these various state court findings, it is inconceivable that the Utah Supreme Court applied the erroneous standard the Arizona Supreme Court used in Tison or failed to find that Andrews' acted intentionally or knowingly as required by Utah law, or failed to find that he attempted to kill, intended that a killing take place, or that lethal force would be employed as required by Enmund and Cabana.

Finally, Petitioner claims the objective facts bearing on his level of culpability "are far more equivocal than in Tison." Petition at 19. Andrews' participation did possess some similarities to that of the Tisons'. He participated in the planning of the underlying felony, personally expressed a willingness to kill (in a discussion with an acquaintance before the robberies), brought weapons to the scene, abducted and bound the victims, escorted them to the murder site, heard them beg for mercy, participated in discussions as to what to do with them, made no effort to help them, and continued to participate in felonious acts with his co-defendant after the killings. The deaths would not have occurred but for Andrews' assistance, and there was evidence Andrews could have anticipated the use of lethal force. He also did nothing to interfere with or disassociate from the killer.

But far more than the Tisons, the victims' pleas for mercy were made directly to Andrews, and he personally participated in the repeated poisonings of his victims, watching as they wretched and vomited the drain cleaner he had repeatedly helped to administer. He aided in giving a second dose to Stanley Walker when the first dose failed to work. He personally put a gun to Orren Walker's head and threatened him in an attempt to force him to administer the caustic substance. He gave orders to Pierre to lock the door upstairs as the poisonings commenced. He taped the victims' mouths shut after the Drano had been administered to prevent them from spitting it out. Such an act could only have been motivated by an intent to kill or in contemplation that a life would be taken. Enmund, 458 U.S. at 801. The medical examiner verified that the dosages of the sodium hydroxide drain cleaner would have caused death had the victims been left unattended for 12-24 hours, and even then, survival would have depended on how skilled the medical attention was because the chemical burns to the victims' larynxes, esophaguses and stomachs were so severe.

Later, just before the shootings commenced, Selby told Andrews "about thirty minutes" and Andrews left. The fact that the total duration of the rape and the execution-style shootings indeed took "about thirty minutes," creates a reasonable inference that Andrews knew precisely what Selby was going to do when Andrews left the shop. And during the course of the shootings, Selby's .25 caliber automatic apparently ran out of ammunition.[70] Selby then momentarily left the basement, and returned, armed with the .38 caliber gun. Andrews had earlier been seen holding and spinning the chamber of a .38 caliber revolver. When Andrews exited the final time, the rear door was not rebolted as it had been before (3213). It is reasonable to infer from these facts that Andrews waited nearby (perhaps as a

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70 Two shots from the .25 caliber had been discharged earlier in the evening as Orren descended the stairs, one shot was fired into Carol's head, one shot into Cortney's head, one shot into the floor near Orren's head, one non-fatal shot at Stanley's head, and one non-fatal shot at Orren's head.

lookout) for "about 30 minutes" and during that time Selby obtained the .38 from him to complete the shootings. The final two fatal shots into the heads of Michelle and Stanley were from the .38 caliber weapon.[71] Clearly, Andrews' death sentence is sustainable, not only under the new Tison standard, but under the higher standard of Edmund and Cabana. There is no need to remand this case for a further assessment of Andrews' culpability.[72]

III.

BECAUSE PETITIONER HAS NEVER PREVIOUSLY RAISED THE "DOUBLE COUNTING" ISSUE, HE IS PROCEDURALLY BARRED FROM RAISING IT FOR THE FIRST TIME ON CERTIORARI. ADDITIONALLY, THE CAPITAL SENTENCING PROCEDURES IN UTAH ARE CONSTITUTIONAL AND THE GRANT OF CERTIORARI IN LOWENFIELD V. PHELPS, 86-6867, 55 U.S.L.W. 3852 (JUNE 22, 1987) DOES NOT REQUIRE THAT THIS COURT GRANT CERTIORARI IN THE PRESENT CASE

This Court recently granted certiorari to determine whether a sentencing scheme that permits a death sentence to be based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious imposition of

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71 At least four other .38 caliber slugs from the same weapon were located at the scene. See n. 6, supra.) It is not known when they were fired, who fired them, or who or what the intended targets of these other shootings were.

72 Petitioner claims that unlike the Tisons, he "on several occasions protested his co-perpetrator's violent behavior." Petition at 19. Yet, Orren characterized Andrews and Selby's various communications during the evening, not as arguing, but "more for carrying things out, just what was transpiring" (3203). Orren also said that Andrews' comment "What did you do that for man?" after Selby's gun unexpectedly discharged twice into the darkness is readily attributable to the fact Andrews was standing in front of Selby and jumped and was startled by the sudden shots (3140, 3203). He also may have been concerned that the shots would attract the attention of others including law enforcement officers, and was not in accordance with their plan to use a more silent killer--the liquid drain cleaner (which they apparently had brought with them, and which they already had out on a stool when Orren arrived).

The fact that Andrews appeared "nervous and upset is of little consequence given that Orren testified that Selby was flighty too (3203), and that Andrews' being disturbed was readily attributable to Selby's gun suddenly going off (3203).

Andrews comment, "I can't do it, I'm scared" can hardly be characterized as a protestation of Selby's subsequent behavior. Taken in conjunction with the "about thirty minutes" comment and other evidence cited above, the reasonable inference is that Andrews intended that the killings occur, but simply did not want to be the one to pull the trigger.

the death penalty. Lowenfield v. Phelps, No. 86-6867, 55 U.S.L.W. 3852, 3876 (June 22, 1987). Although certiorari was granted in Lowenfield, certiorari review of the present case is not warranted for two reasons.

A. PETITIONER IS PROCEDURALLY BARRED FROM RAISING THE CLAIM FOR THE FIRST TIME ON CERTIORARI.

The issue is barred from consideration by this Court under doctrines of procedural default. Petitioner failed to ever raise this issue in the state courts. It was neither raised at trial nor on direct appeal. Petitioner will likely argue that his claim was preserved on direct appeal under his broader argument that Utah's sentencing statutes permit arbitrary and discretionary imposition of the death penalty in violation of the Eighth and Fourteenth Amendment principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972).[73] However, he never asserted the double-counting theory in support of his Furman argument. The Utah courts were never sufficiently alerted to the theory so as to consider it "fairly presented." Picard v. Connor, 404 U.S. 270, 275 (1971). One should not be allowed to merely shout "Furman" and expect every conceivable theory under Furman to be preserved for later review. Broad conclusory statements of general unconstitutionality under Furman with no supporting analysis or focus on specific defects in a state's system are inadequate to preserve an issue for later review. Id.

Petitioner also failed to raise this issue on state habeas corpus. Again, petitioner will likely argue that this issue was raised under his broader argument that Utah's sentencing statute is unconstitutional.[74] However, it is clear that neither the lower court considering the state habeas petition nor the Utah Supreme Court on appeal ever considered the "double-counting" issue. See Andrews v. Morris, 607 P.2d 816. The issue also was never raised in his subsequent state habeas corpus action. Andrews v. Morris II, 677 P.2d 81.

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73 See pp. 7-18 of Andrew's co-defendant, Pierre's brief on direct appeal, Appendix E, which Andrews joined.

74 See Paragraphs 12(A)(1)-(4) at pp. 3-7 of Andrews' Amended Petition, 11/28/78, attached as Appendix B.

As noted in Point I.B., supra, Utah applies a strict doctrine of waiver. Claims must be preserved on direct appeal and habeas petitioners are precluded from raising issues in postconviction proceedings which could or should have been brought on direct appeal unless it would be wholly unconsciousable not to reexamine the conviction (Utah's equivalent of the federal cause and prejudice, fundamental injustice exceptions). Robbins v. Cook, 737 P.2d 225 (Utah 1987); Andrews v. Morris, 607 P.2d at 819-20. The waiver rule also bars subsequent postconviction petitions which raise issues which should have been brought in earlier petitions. (Utah's equivalent to the federal abuse of the writ rule, Utah R. Civ. Proc. Rule 65B(i)(2)(4); Robbins v. Cook II, Utah Sup. Ct. No. 870134 (May 29, 1987) (attached as Appendix I).

Thus, under Reed v. Ross, 468 U.S. 1, 11 (1984), Engle v. Isaac, 456 U.S. 107, 129 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977), petitioner procedurally defaulted the claim for federal habeas corpus review. He never attempted to establish cause and prejudice for the default in the lower federal courts. Nor could he have done so.

As noted in Point I.B., supra, mere failure of counsel to recognize the factual or legal basis for a claim or to raise an issue despite recognizing it does not constitute cause, absent establishing that the claim was so novel that its legal basis was not reasonably available to counsel. This claim was clearly available to counsel when he was litigating in the state courts. It had been "percolating" in the various courts and was clearly foreseeable. Smith v. Murray, 106 S. Ct. 2661, 2667 (1986). E.g., Gray v. Lucas, 677 F.2d 1086, 1104-05 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983); Dobard v. State, 435 So.2d 1338, 1344 (Ala. Cr. App. 1982), cert. denied, 464 U.S. 1063 (1984); People v. Kubat, 447 N.E.2d 247, 276 (Ill. 1983), cert. denied, 464 U.S. 865 (1983); State v. Monroe, 397 So.2d 1258, 1274 n. 6 (La. 1981), cert. denied, 463 U.S. 1229 (1983); Leatherwood v. State, 435 So.2d 645, 648 (Miss. 1983), cert. denied, 465 U.S. 1084 (1984); State v. Taylor, 304 N.C. 249, 285-

6, 283 S.E.2d 761, 783-84 (1981), cert. denied, 463 U.S. 1213 (1983); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 567-68 (1979), cert. denied, 446 U.S. 941 (1980); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 622 (1979); State v. Pritchett, 621 S.W.2d 127, 140-141 (Tenn. 1981).

Nor could petitioner have established a fundamental miscarriage of injustice (where a constitutional violation has probably resulted in the conviction of one who is actually innocent. Engle v. Isaac, 456 U.S. at 135. Murray v. Carrier, 106 S. Ct. at 2650. Overwhelming evidence was presented at trial of petitioner's guilt. The overlap of the statutory aggravating circumstances with the capital offense definition did not preclude the development of any true facts or result in the admission of any false facts regarding any sentence question. The facts concerning all of the aggravating circumstances were fully admissible at both the guilt and sentence stages of petitioner's trial, irrespective of whether any of the statutory aggravating circumstances overlap with the capital offense definition. Moreover, as will be shown below, at the penalty phase, the State established additional aggravating circumstances beyond those petitioner claims were "double-counted." Also, it will be shown that Utah's statutory scheme does not contain the "double-counting" problem, petitioner claims. Thus, under the present circumstances, petitioner could not have shown cause for the default or prejudice resulting from it.

Finally, petitioner, on federal habeas corpus, not only failed to even attempt to establish cause and prejudice for his earlier state procedural default, but he failed to raise the "double counting" issue altogether in any federal proceeding.[75] The issue now surfaces for the first time on certiorari. This Court has repeatedly ruled that it will refuse to decide

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75 See Paragraphs 14(A)-(K) at pp. 12-17 of Andrews' Second Am. Petition, Appendix C. Again, petitioner will likely argue that his claim was preserved in the federal courts under his broader argument that Utah's sentencing statutes permit arbitrary and discretionary imposition of the death penalty in violation of the Eighth and Fourteenth Amendment principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972).

questions not raised or resolved in the lower courts. See Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition for certiorari but not in court of appeals is not properly before us). In Illinois v. Gates, 459 U.S. 1028, 1029 (1982) (Stevens, Brennan and Marshall, Justices dissenting to restoration of case to calendar for reargument) citing Cardinale v. Louisiana, 394 U.S. 437 (1969), it was stated:

> [a]s a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court's judgment on a ground that the lower court had no opportunity to consider. It is especially po . practice to do so when the basis for reversal involves a factual issue on which neither party adduced any evidence. Those considerations apply with added force when the judgment of the highest court of a sovereign State is being reviewed.

B. THE GRANT OF CERTIORARI IN LOWENFIELD DOES NOT REQUIRE THE GRANT OF CERTIORARI IN THE PRESENT CASE BECAUSE OF DISTINGUISHING FEATURES IN UTAH'S CAPITAL SENTENCING SYSTEM.

Should this Court find that the issue was adequately preserved below, certiorari still should not be granted because Utah's capital sentencing procedure is distinguishable from the sentencing procedures in the cases cited by petitioner.

Petitioner alleges Utah's procedures are unconstitutional in that the law allows for unguided discretionary imposition of the death penalty because the aggravating circumstance used to prove first degree murder at guilt phase is reconsidered at penalty phase. He argues that a jury could vote for the penalty of death without any standard of aggravation but the one found at the guilt phase of the trial and thus inadequate narrowing is done to determine appropriate candidates for the death penalty.

Petitioner cites Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied, 474 U.S. 1013 (1985), where the court held that it was error to submit to the jury at penalty phase the aggravating circumstance that "the capital felony was committed for pecuniary gain," when the defendant had been convicted at guilt phase of "the unlawful killing of a human being [while] engaged in the perpetration of . . . robbery." Id. at 263. This practice has been referred to as "double counting" or "doubling

up" of an aggravating circumstance. See Collins, 754 F.2d at 264 n. 3; Leatherwood v. State, 435 So.2d 645, 648 (Miss. 1983), cert. denied, 465 U.S. 1084 (1984). However, under the Arkansas statutes at issue in Collins, "a finding of killing in the course of a listed felony was not itself sufficient to warrant the imposition of the death sentence[;] [t]he jury also had to find at least one aggravating circumstance, and this circumstance had to be one of six listed in the statute § 41-4711," which contained as one alternative the "pecuniary gain" circumstance. Id. In other words, Collins was found guilty under the felony murder provision of Arkansas's first degree murder statute, which did not require proof of an intentional killing. As with most traditional felony murder statutes, a defendant is guilty of murder whether the killing was intentional or unintentional, so long as the killing was committed during the commission of an enumerated felony.[76] Under the Arkansas scheme, the state had to then prove the aggravating circumstance of pecuniary gain in order to render Collins eligible for the death penalty. But, by using that particular circumstance to aggravate the felony murder, the Collins court believed that the state had effectively circumvented the statutory requirement of proving an aggravating circumstance, since pecuniary gain is always an aspect of robbery (the underlying felony for the felony murder conviction). 754 F.2d at 264. Thus, the statutory aggravating circumstance did not perform its constitutionally necessary function of narrowing the class of persons eligible for the death penalty and there was the danger that a person could be sentenced to death for straight

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[76] See Tison v. Arizona, 107 S. Ct. 1676 (1987) for a detailed analysis of felony murder statutes in this country.

A felony murder provision is contained in Utah's second degree murder statute, Utah Code Ann. § 76-5-203(1)(d) (Supp. 1973). However, Utah's first degree murder statute only uses designated felonies as underlying "aggravating" circumstances for an intentional or knowing killing. See Utah Code Ann. § 76-5-202(1)(d) (Supp. 1973), and Point II, supra.

felony murder without regard to his intent. Id., citing Godfrey v. Georgia, 446 U.S. 420 (1980); Zant v. Stephens, 462 U.S. 862 (1983).

First, the Arkansas scheme applied in Collins is much different from the Utah statutes applied in petitioner's case. As discussed in Point II, supra, Utah's first degree murder statute requires a showing of an intentional or knowing killing under certain statutorily defined aggravating circumstances. Utah Code Ann. § 76-5-202 (Supp. 1973). A first degree murder verdict at the guilt phase is appropriate under the statute only when the prosecution demonstrates beyond a reasonable doubt intentional or knowing action together with one or more of the enumerated aggravating circumstances. A death penalty is neither automatic nor mandatory even when such elements are shown. A jury is not required to return a death verdict merely because they made the requisite findings under Section 76-5-202. Under Utah's capital sentencing statutes, Sections 76-3-206, -207 (Supp. 1973), a separate penalty hearing is held for consideration of more aggravating circumstances and the defendant's introduction of any fact in mitigation of the penalty. And even then the sentencer is not required to impose a death sentence if no mitigation evidence is presented.

The jury in Andrews' case heard evidence at the sentencing phase and determined whether total aggravation outweighed total mitigation and whether the death penalty was

appropriate in this particular case.[77] During the penalty hearing petitioner put on evidence of mitigating factors and the State put on evidence of additional aggravating circumstances..

Unlike the situation noted in Collins, the Utah scheme narrows the class of persons eligible for the death penalty by requiring intentional and knowing killing coupled with at least one statutory agggravating circumstance, both of which must be proved beyond a reasonable doubt as elements of first degree murder at the guilt phase of the trial. Then, "[a]s with the Texas scheme upheld in Jurek v. Texas, 428 U.S. 262 (1976)] the Utah system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature of the crime and the defendant's character, background, history, mental condition, and physical condition," Andrews v. Shulsen, 600 F. Supp. 408, 423 (D. Utah 1948) aff'd 802 F.2d 1256 (10th Cir. 1986); citing § 76-3-207; California v. Ramos, 463 U.S. 992, 1004 (1983), before the death eligible defendant is sentenced.

Therefore in Utah, although one convicted of first degree murder does enter the penalty phase with at least one built-in aggravating circumstance, this obviously was the intent of the legislature. An initial narrowing occurs at guilt phase[78] and then further narrowing based upon additional individualized

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77 The sentencing instructions required the state to prove that the total aggravating factors outweighed the mitigating ones. State v. Pierre, 572 P.2d at 137-48. The instructions identified numerous aggravating and mitigating circumstances, beyond those proved as elements at the guilt phase, which related not only to the circumstances of the crime, but the character of the defendant. Sent. Inst. No. 4, R. 414 (attached as Appendix K). And, of course, the instructions allowed the jury to consider all evidence received at both guilt and penalty phases and to factor in any aggravating circumstances they had previously found at the guilt phase into its overall weighing of all aggravating and mitigating factors. Sent. Inst. Nos. 1 and 4 (R. 412. 414) (Appendix K).

78 An intentional or knowing killing without an aggravating circumstance defined under § 76-5-202 is second degree murder. Section 76-5-203(1)(a).

information occurs at penalty phase--a procedure that does not run afoul of Godfrey. Thus, there is not the "doubling up" condemned in Collins, where the robbery circumstance effectively served to render the defendant guilty of first degree murder under the traditional felony murder rule, and also served to make him eligible for the death penalty--something the Eighth Circuit believed was never intended under Arkansas law and which created the "failure to narrow" violation identified in Godfrey and Zant. Collins, 754 F.2d at 265.

In any event, other courts have rejected "double counting" challenges similar to that made in Collins. For example, holding that the application of Mississippi's capital punishment statutes did not result in arbitrary imposition of the death penalty in violation of Furman, the Mississippi Supreme Court stated:

> Under our capital murder statute, when an accused is found guilty of capital murder arising out of a robbery, he then becomes subject to a jury finding that he should be executed if the jury feels that the facts justify it. However, his execution is not mandated and the jury may properly find that he should be sentenced to life in prison. They may so find whether the defendant puts on any evidence of mitigating circumstances or not. This is a far cry from the old statute which mandated execution upon conviction of a capital offense.
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> The appellant's argument that he enters into the sentencing phase of the bifurcated trial with one strike against him is correct in one sense--i.e., if he had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.
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> At the sentencing hearing appellant may put on evidence of mitigating circumstances of an unlimited nature pursuant to section 99-19-101(6) (Supp. 1982) and Washington v. State, 361 So.2d 61 (Miss. 1978), so as to convince the jury that he should not be executed.

Leatherwood, 435 So.2d at 650. In Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984), the

Eleventh Circuit rejected the petitioner's argument that Florida's system made the "death penalty the 'automatically preferred sentence' in any felony murder case":

> The short answer is that the United States Supreme Court has upheld the Florida death penalty statute, including necessarily the use of this statutory aggravating factor. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Florida does not mandate the death penalty in all felony murder cases. The defendant is not precluded under Florida law from presenting any mitigating factors.

709 F.2d at 1447.

Finally, although certiorari was most likely granted in Lowenfield to resolve the conflict between the Eighth Circuits ruling in Collins, and the Fifth Circuits rulings in Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 106 S. Ct. 1984 (1987); Welcome v. Blackburn, 793, F.2d 672 (5th Cir. 1986), cert. denied, 107 S. Ct. 1985 (1987) and Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), it appears that Lowenfield, like Collins is distinguishable from the instant case. In Lowenfield, apparently the only aggravating circumstance was the one included in the crime definition. Lowenfield, 817 F.2d at 288. In this case, in addition to the aggravating circumstances relied upon in the guilt phase, the State put on evidence of additional aggravation pertinent to petitioner's character, background, and history. Evidence was introduced that petitioner was on probation for felony theft when the murders occurred (4195) and that he had a prior criminal history of auto theft and burglary (4247-70). Additionally, the State introduced his military records reflecting several disciplinary actions and evidence that his military grade was reduced for misconduct (4242-46). Thus, unlike Lowenfield and Collins, the jury in this case had before it additional aggravating factors other than those used in the guilt phase of the trial. Cf. Thompson v. Lynaugh, 821 F.2d 1054, 1059-60 (5th Cir. 1987).

Given the significant differences between Collins and Lowenfield and petitioner's case, this Court should not grant certiorari on this issue.

IV.

PETITIONER'S ATTEMPT TO SEEK REVIEW OF A CAPITAL SENTENCING STANDARD WHICH THE UTAH SUPREME COURT ESTABLISHED IN ANOTHER UNRELATED CASE SHOULD BE REJECTED BECAUSE PETITIONER DID NOT ADEQUATELY PRESERVE THE ISSUE IN HIS OWN CASE; HE DEFAULTED IT FOR FEDERAL HABEAS CORPUS REVIEW; HE DID NOT FRAME IT IN THE SAME CONTEXT IN THE LOWER COURTS; THE STANDARD IS BASED UPON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS; THE STANDARD IS NOT REQUIRED UNDER CONTROLLING DECISIONS OF THIS COURT; AND THERE IS NO CONFLICT IN THE CIRCUITS WHICH UNIFORMLY CONCUR WITH OTHER FEDERAL AND STATE JURISDICTIONS THAT SUCH A SENTENCING STANDARD IS NOT CONSTITUTIONALLY REQUIRED.

Petitioner seeks to have this Court review whether an extremely high standard for capital sentencing adopted by the Utah Supreme Court, as a matter of state law, in a capital case totally unrelated to this case should now be embraced as a matter of federal constitutional law for this country. He asks this Court to declare that in addition to current requirements this Court has established for imposition of the death penalty, the Eighth and Fourteenth Amendments further require that a capital sentencer be persuaded beyond a reasonable doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances, and that the death penalty is justified and appropriate in the circumstances. Certiorari should be denied for several reasons:

First, petitioner procedurally defaulted the issue for federal habeas corpus review because, despite his claims to the contrary, he failed to seek such a standard in his own case in the state courts (either on state law grounds or as a matter of federal constitutional law). The standard was sought by a Mr. Wood, in an unrelated case and never by Mr. Andrews. See State

v. Wood, 648 P.2d 71 (Utah), cert. denied, 449 U.S. 891 (1982).[79] Andrews seeks to use Wood's case to gain review of a sentencing standard Andrews personally never sought.

In Wood, the Utah Supreme Court stressed that Andrews and others had not raised the issue in the same context as had Mr. Wood. 648 P.2d at 80. Later, in Andrews v. Morris, 677 P.2d 81 (Utah 1983), the Utah Supreme Court exhaustively analyzed the history of Andrews' case in the state courts to determine whether he had ever sought the same capital sentencing standard Mr. Wood had sought. It determined that he had not, and the record amply

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79 In Wood, the Utah Supreme Court, recognizing that the sentencing standard it was proposing was not constitutionally required, held on "preferred grounds of statutory construction," that thereafter the appropriate standard for capital sentencing would be:

> After considering the totality of the aggravating and mitigating circumstances, [the sentencer] must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and . . . must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

Id. at 82-83.

supports this finding. Id. at 86-88.[80] Despite this fact, the court reached the narrower question whether Andrews, whose case had long been final,[81] was nevertheless entitled to the retroactive benefit of the new sentencing standard, and concluded

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80 The court noted inter alia that Andrews did not submit jury instructions at the penalty phase of his trial and did not object to those given. (Cf. the trial transcripts at 4271, 4304-05). Citing from the briefs on direct appeal, the court found that Andrews sought a standard of requiring the State "to prove beyond a reasonable doubt the absence of any mitigating factor which the defendant raises in the sentencing proceedings." (See Point XII of Selby's amended brief on appeal which Andrews joined and which is attached as Appendix L). Thus, the court observed, Andrews confused the issue of the burden of proof of the existence of facts in aggravation or mitigation of his crime with the issue of the degree of certitude that the jury must reach about the imposition of the death penalty after consideration of mitigating and aggravating circumstances. Accordingly, the court's opinion on direct appeal only addressed and rejected the narrower standard Andrews had proposed. (Andrews has claimed he and his co-defendant framed the issue more broadly in Point XII, but when the point is read in its entirety and in context, it stands for no more than the narrower issue. Moreover, they failed to raise any form of the issue in their petitions for rehearing in that case). On direct appeal, the supreme court then addressed, on its own, whether the sentencing standard utilized in Andrews' case for reviewing aggravating and mitigating circumstances was sufficiently high to pass constitutional muster (solely under the due process clause of the fourteenth amendment, and not under the Eighth Amendment) and concluded that it was. But in doing so, it did not discuss a reasonable doubt standard, and Andrews had never contended for one. In Andrews v. Morris, the court ultimately concluded that the capital sentencing standard Andrews had previously sought was "imprecise and confused" and "certainly cannot be said to have been squarely posed as later occurred in Wood." 677 P.2d at 88.

The court did not examine whether Andrews sought the Wood-type sentencing standard in his first state habeas corpus petition (which was filed and denied before the Wood decision was rendered). However, his state petition shows that he did not. Paragraph 12(a)(4) of that petition (attached as Appendix B) claimed that there were "no standards or guidance by which sentencing authorities are to balance . . . aggravating and mitigating factors . . . or by which they are to determine whether a particular aggravating or mitigating factor has been established," and "[t]he State was required to meet no burden of proof as to any fact in the sentencing hearing, other than a general burden of persuading the jury that the death penalty 'was appropriate'." There is no reference to a reasonable doubt standard and Andrews never asserted the need for such a standard under the federal constitution.

81 "Final" meaning "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [to the United States Supreme Court] had elapsed" before the new rule was announced. Linkletter v. Walker, 381 U.S. 618, 622, n. 5 (1965).

that he was not. Id. at 88-95.[82] But merely because Andrews sought the retroactive benefit of a ruling which had been based on state law does not change the fact that he never contended in the state courts, as he does in his present petition for certiorari, that the reasonable doubt standard for weighing aggravating and mitigating circumstances in a capital case is

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[82] The court recognized and applied well-established principles of federal retroactivity law in reaching its decision, and restricted retroactive application of the new standard only to cases not yet final. Id. at 88-95. (The court subsequently applied Wood retroactively to a case pending on direct appeal when Wood was decided, and thus not final. State v. Norton, 675 P.2d 577, 583-84 (Utah 1983).) The court in Andrews v. Morris also denied relief to Andrews on harmless error grounds observing that the evidence at his trial would have satisfied the Wood standard, and that the

> aggravating circumstances of petitioners' crimes so overwhelmingly outweighed the mitigating circumstances that "no rational judge or jury could . . . have determined [otherwise]." This Court, upon its own independent, comprehensive review of the record was clearly convinced there was no basis for reasonable doubt as to the legality and appropriateness of the imposition of the death penalty in these cases.
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> The entire record of petitioners' original trial is before us in connection with these petitions. We are familiar with all of the facts concerning their crimes and all of the evidence submitted at their sentencing hearing. We are able, on the basis of our examination of that evidence, to conclude with complete confidence that the use of the Wood standard in the penalty phase "could not possibly affect the balance." There can be no reasonable doubt that, in petitioners' circumstances, the totality of the aggravating factors outweighed the totality of the mitigating factors and the imposition of the death penalty was appropriate.

677 P.2d at 95-96. Contrary to petitioner's assertions, the Utah Supreme Court did not misstate the facts as to Andrews' involvement in reaching this decision. Cf. Statement of the Case, and Point II, supra.

constitutionally required.[83] The sole issue Andrews preserved for possible federal review was whether the Utah Supreme Court's refusal to give him the retroactive benefit of the state law based Wood standard somehow violated federal constitutional rights (ie. his rights to equal protection and due process).[84]

In his second amended federal habeas corpus petition (attached as Appendix C), Andrews merely reiterated his claim that no standards are provided in Utah whereby sentencing authorities are to balance aggravating and mitigating factors, or by which they are to determine whether a particular aggravating or mitigating factor has been established.[85] He added that the Utah Supreme Court changed the burden but the rule was not applied by the trial court or the Utah Supreme Court in his case. And he indeed claimed that the failure of the Utah Supreme Court to give him the retroactive benefit of the new standard denied him federal equal protection and due process rights. See

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[83] Denial of certiorari is appropriate where the position now urged by petitioner is contrary to that which was asserted in the courts below. Youakim v. Miller, 425 U.S. 231, 234 (1976); United States v. Mendenhall, 446 U.S. 544, 551-52 n. 5 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970); Delta Airlines v. August, 450 U.S. 346, 362 (1981). Certiorari is also appropriately denied where the decision below is based upon an independent and adequate state ground. R. Stern & E. Gressman, Supreme Court Practice, 168-85 (6th ed. 1986). That the Wood decision was grounded solely in state law should be adequate reason for denying certiorari, let alone the fact that the present petitioner failed to raise the issue in his own case. Moreover, as a corollary rule, errors of state law not rising to the level of constitutional defect are not cognizable on federal habeas corpus. Gryger v. Burke, 334 U.S. 728, 731 (1948); Engle v. Isaac, 456 U.S. 107, 120 n. 19 (1982); Barclay v. Florida, 463 U.S. 939, 957-58 (1983); Wainright v. Goode, 464 U.S. 78, 86 (1983); Pulley v. Harris, 465 U.S. 37, 42-43 (1984).

[84] A state court's decision whether to apply its decisional law retroactively raises no federal question per se, nor does its decision to extend retroactive application only to cases pending on direct appeal and not to cases which were already final. Rather, "[t]he federal constitution has no voice upon the subject" and this Court has left the states to develop their own rules on retroactivity. Great N.R. Co. v. Sunburst Oil and Ref. Co., 287 U.S. 358, 364 (1932).

[85] The Utah Supreme Court on direct appeal found that the sentencing instructions given in Andrews' case did provide a standard. The jury was adequately advised that the burden was on the State to show that the totality of the evidence of aggravating circumstances outweighs the totality of mitigating circumstances because the instructions placed the burden on the State to prove that the death penalty was appropriate (Sent. Inst. No. 2, St. R. 412) and required the jury to "weigh" the aggravating and mitigating factors (Sent. Inst. No. 1, St. R. 412). State v. Pierre, 572 P.2d at 1348.

paragraphs 14D, 14J, and 17 of that petition. Thus, neither the federal district court nor the Tenth Circuit directly analyzed the issue in the same context Andrews now presents on certiorari. Andrews v. Shulsen, 600 F. Supp. at 423; Andrews v. Shulsen, 802 F.2d at 1264-65. (This may explain why Andrews does not base this point of his petition for certiorari on a claim that the Tenth Circuit's ruling was in error). Moreover, both courts soundly rejected his claim that the refusal of the Utah Supreme Court to accord him the retroactive benefit of Wood violated his equal protection and due process rights. 600 F. Supp. at 426-30; 802 F.2d at 1270-71.[86] See also Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986), cert. denied ___U.S.___ (No. 86-6303, April 27, 1987) (the companion case to Andrews' wherein this Court denied certiorari on the same equal protection and due process issues). And even if Andrews had attempted to raise the issue in its present form for the first time on federal habeas corpus, his failure to present it on direct appeal as required by Utah law, see Andrews v. Morris, 607 P.2d at 819-20, or on collateral attack in the state courts, constitutes a procedural default that is governed by the cause and prejudice test. See Reed v. Ross, 468 U.S. 1 (1984); Murray v. Carrier, 106 S. Ct. 2639, 2646-48 (1986); and Smith v. Murray, 106 S. Ct. 2661, 2665-66 (1986). And the Utah Supreme Court's alternate finding that the failure to apply a Wood-type standard in Andrews' case was harmless error, see footnote 82, supra, clearly establishes that Andrews suffered no actual prejudice from the procedural default.

In summary, given the above factual and procedural posture of this case, the issue should not be reached. Petitioner has misstated essential facts to gain review of this claim on certiorari. Moreover, the claim was not adequately preserved below, it was procedurally defaulted for federal habeas corpus review, it was rooted in state law, and it was not framed in the same context in the lower courts.

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86 It now appears petitioner has abandoned this claim on certiorari.

Secondly, certiorari should be denied because the lower federal courts' opinions on the adequacy of the capital sentencing features applied in this case are in accord with this Court's prior rulings; the lower courts properly recognized that controlling decisions of this Court do not require the extreme sentencing standard petitioner now suggests; there is no conflict in the circuits on the issue; there is overwhelming concurrence among the jurisdictions that such a standard is not constitutionally required; and nothing has been shown by petitioner to warrant reexamination of the issue.

The constitutionality of Utah's overall capital sentencing system as it was applied in Andrews' case was fully explored by the lower federal courts in Andrews v. Shulsen, 600 F. Supp. at 420-25; and Andrews v. Shulsen, 802 F.2d at 1260-65. The system was measured with controlling Supreme Court case law and was found to meet present constitutional concerns. Id. Petitioner does not directly challenge this aspect of the lower courts' opinions, but nevertheless seeks a higher sentencing standard. Reviewing courts on federal habeas corpus should only determine what features of a state's system are constitutionally mandated, and not search for additional features to make a constitutionally fair system fairer. See Engle v. Isaac, 456 U.S. 107, 120 n. 19 (1982). Respondent submits that where a system, like Utah's, has been found to have the various features which have been approved by this Court, the extreme sentencing standard petitioner suggests is not necessary to suitably direct and limit sentencing discretion "so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion); accord Zant v.

Stephens, 462 U.S. 862, 874 (1983).[87]

This Court has repeatedly recognized this fact. No decision of this Court has imposed such a standard for weighing aggravating and mitigating factors, and at least one decision expressly states that such standards are not constitutionally required.

In Gregg, nothing was said by this Court as to a burden of proof beyond requiring that one statutory aggravating circumstance be found beyond a reasonable doubt to narrow the candidates for the death penalty. The Court did not impose any standard of proof with reference to the assessment of aggravating and mitigating factors even though Georgia's statute only required the sentencer to consider such factors. Later, in Zant, this Court again reviewed Georgia's system which the Court observed did not require the sentencer to give any special weight to any aggravating circumstances or balance them against mitigating factors by any specific standard. This Court concluded that so long as at least one statutory aggravating

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87 The most significant features include:

1. Utah statutes limit capital homicides to intentional and knowing murders committed under statutorily enumerated aggravating circumstances.

2. At least one statutorily defined aggravating circumstance must be proved beyond a reasonable doubt at the guilt phase (as an element of first degree murder) to narrow the class of persons who are subject to the death penalty. Cf. Zant v. Stephens, 462 U.S. 862, 876-78 (1983);

3. After conviction, a separate hearing on the issue of penalty is required. Aggravating and mitigating factors are presented which focus on the circumstances of the crime and the characteristics of the defendant.

4. Defendants are not precluded from putting on any facts in mitigation.

5. The jury in this case was given sentencing instructions providing that the burden was on the state to show that the totality of the evidence or aggravating circumstances outweighs the totality of the mitigating circumstances.

6. Sentencing verdicts must be unanimous.

7. Comprehensive appellate review including a review of a sentence of death for proportionality and to determine if the sentence resulted from prejudice or arbitrary action is provided.

circumstance is found beyond a reasonable doubt at some point in the proceedings to narrow the class of persons eligible for the death penalty, and so long as a state's appellate court reviews the sentencer's "consideration" of the factors in search of arbitrariness, capriciousness or disproportionality, "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." 462 U.S. at 876, n. 13.

In Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion), this Court reviewed Florida's system which merely required the sentencer to weigh the factors against one another and did not require proof beyond a reasonable doubt in the weighing process. The Court found that the process adequately focused the sentencer's attention on the circumstances of the crime and the character of the individual defendant--the criteria relevant to determining whether the death sentence should be imposed.[88] Id. at 251. Justice White's concurring opinion, joined by the Chief Justice and Justice Rehnquist further explained:

> [A]lthough the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. Under Florida law, the sentencing judge is required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely . . . .

Id. at 260-61. Later, in Barclay v. Florida, 463 U.S. 939, 954 (1983), this Court observed that "Unlike the Georgia statute . . . Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances . . . . The statute does not establish any special standard for this weighing process."

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[88] The Court acknowledged that under Florida law evidence must be so "clear and convincing that no reasonable person could differ", 428 U.S. 249, but that was only in discussing the circumstances in which the trial judge could override the advisory opinion of a jury for life imprisonment.

Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion), is also not supportive of such a standard. Texas' scheme only required that the jury find one of three statutory sentencing conditions beyond a reasonable doubt. These are necessary aggravating conditions in order to impose the death penalty.[89] This Court noted the presence of the statutory conditions required a narrow focusing on relevant criteria. However, the Texas statutory provision did not provide for a weighing of the aggravating circumstances against the mitigating ones. Rather, mitigating evidence could be introduced bearing on the aggravating proposition that had to be found beyond a reasonable doubt. This Court did not discuss a burden of proof standard nor suggest that any standard was constitutionally mandated as to the weighing process.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court reviewed Oklahoma's scheme which provides that the sentencer must find that aggravating circumstances outweigh mitigating evidence. No burden of proof is stated for this weighing process. Although not a central issue in the case, repeated emphasis was made by this Court that the sentencer and reviewing state appellate court "may determine the weight to be given relevant mitigating evidence." Id. at 115. The Court concluded that:

> On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them.

Id. at 117. Similarly, throughout the Chief Justice's dissenting opinion, he consistently analyzes a court's consideratio of the sentencing criteria in terms of a "weighing" process where mitigating evidence may or may not "tip the scales" in its direction or "offset the aggravating circumstances." Id. at 122,

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89 One of the three conditions is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Texas Code of Crim. Pro., Art. 37.071(b)(2). Such a determination requires consideration of behavioral, sociological, and psychological factors, which clearly do not lend themselves well to any burden of proof, particularly a reasonable doubt standard. The other two conditions are purely factual questions where the reasonable doubt standard is at least somewhat functional.

125-27. Thus, both the dissent and the majority talk exclusively about merely weighing the mitigating factors against the aggravating factors.

Petitioner quotes a passage from Wood referring to Woodson v. North Carolina, 428 U.S. 280, 303 (1976), which stressed the need for reliability in determining the appropriateness of the death penalty in a specific case. Taken in context, the language in Woodson related solely to the constitutionality of mandatory death sentencing, and did not relate to a quantum of proof required but to the need to differentiate between offenders according to the criminality of their acts. Petitioner also cites In re Winship, 397 U.S. 358 (1970). There is nothing in Winship that would suggest the need for a finding beyond a reasonable doubt in capital sentencing proceedings. It dealt only with the burden of proof of factual guilt in a criminal case. The standard was required in order to reduce "the risk of convictions resting on factual error." Id. at 363. There is no comparison of factual issues in evaluating aggravating circumstances and mitigating circumstances. Such comparisons do not necessarily interface, and circumstances that may be deemed mitigating may not necessarily be matters susceptible to precise factual proof. Cf. Eddings v. Texas, 441 U.S. 418, 430 (1979).[90]

Petitioner further relies on Justices Marshall's and Brennan's dissent from the denial of certiorari in Teague v. Tennessee, 473 U.S. 911 (1985) and Justice Stevens' comments on the denial of certiorari in Finch v. North Carolina, 459 U.S. 1056 (1982) as illustrative of possible Court interest in the Wood-type standard of proof issue. However, in Teague, the Justices' sole concern was that Tennessee law mandates death if

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90 Consider, for example, the situation in Eddings, supra, where error was found because the sentencer refused to consider mitigating circumstances of the defendant's unhappy upbringing and emotional disturbance, turbulent family life, and harsh discipline by his father. It would be impossible to contrast these with the aggravating factor of shooting a policeman and arrive at any basic conclusion beyond a reasonable doubt. The reasonable doubt standard simply does not lend itself to application when the finding is based on moral and social values rather than particular facts.

the jury determines that the mitigating factors do not outweigh the aggravating factors. The law provides no opportunity for mercy, and it was the Justices' view that juries should always be free to confront the ultimate question of whether death is the appropriate punishment in the specific case even where mitigating factors do not outweigh aggravating factors.[91] They expressed no concern over whether burdens of proof should attach at the penalty phase to the weighing of the factors. In Pinch, Justice Stevens' concern was the same. There appeared to be sufficient ambiguity in the sentencing instructions to eliminate the possible exercise of mercy upon a finding that aggravating outweigh mitigating circumstances. This is not the issue Andrews raises in the instant case.

Petitioner concedes in his petition that "[t]he federal circuits that have considered this issue have rejected such a standard . . . ." Pet. for Cert. at 29 (citing Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983), cert. denied, 464

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91 Utah law does not mandate death as Tennessee law did. Nor was Andrews' jury given sentencing instructions that could be construed as mandating death upon finding that aggravating factors outweigh the mitigating.

U.S. 865 (1984)[92]; Harris v. Pulley, 692 F.2d 1189, 1192, 1195 (9th Cir.), cert. denied, 460 U.S. 1047 (1983). Other state and federal jurisdictions are in accord. See Gray v. Lucas, 677 F.2d 1086, 1105-06 (5th Cir.), reh'g denied 685 F.2d 139, cert. denied, 461 U.S. 910 (1983); United States v. Matthews, 73 M.J. 501 (1980)(en banc)(aggravating and mitigating factors need not be weighed under any burden of proof); People v. Frierson, 25 Cal.3d 142, 158 Cal. Rptr. 281, 599 P.2d 587, 610 (1979) (reasonable doubt standard not required at penalty phase for weighing aggravating and mitigating factors); State v. Gretzler, 609 P.2d 48, 56-57 (Ariz.), cert. denied 449 U.S. 938 (1980); State v. Pritchett, 621 S.W.2d 127, 141 (Tenn. 1981); Smith v. Commonwealth, 599 S.W.2d 900, 911-12 (Ky. 1980); Jackson v. State, 337 So.2d 1242, 1256-57 (Miss. 1976); State v. Simants, 250 N.W.2d 881, 892-93 (Neb.), cert. denied, 434 U.S. 878 (1977);

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92 In Ford, the Eleventh Circuit was fully aware of Utah's Wood case and soundly rejected it stating:

> Third, Ford's argument under In re Winship seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard [citations omitted], the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and unlike facts, is not susceptible to proof by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in Proffitt v. Florida [citation omitted]. Indeed, it appears no case has applied In re Winship in the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of In re Winship. See State v. Johnson, 257 S.E.2d at 617, and State v. Woods [sic] [citation omitted].
>
> Ford's alternate argument . . . is that the Florida capital sentencing proceeding involves new findings of fact significantly affecting punishment to which the full panoply of due process rights should be extended, including the requirement that the state prove beyond a reasonable doubt that aggravating factors outweigh mitigating factors. Again petitioner confuses proof of facts with the weighing process undertaken by the sentencing jury and judge. Because the latter process is not a fact susceptible of proof under any standard, we reject this contention.
>
> Id. (Emphasis is the court's).

Irvin v. State, 617 P.2d 588 (Okla. 1980); State v. Shaw, 272 S.C. 194, 255 S.E.2d 799, 804, cert. denied, 444 U.S. 1026-27 (1979); Ybarra v. State, 679 P.2d 797, 801-03 (Nev.), cert. denied, 470 U.S. 1009 (1985). Given there is no split among the circuits and overwhelming concurrence by the various jurisdictions on the issue, certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 16 day of November, 1987.

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CERTIFICATE OF MAILING

This is to certify that I mailed one copy of the foregoing Brief in Opposition to Petition for Certiorari, by depositing same in the United States Mail, first class, postage prepaid, this 16 day of November, 1987, to the following:

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No. 87-5449

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM ANDREWS,

Petitioner,

- v. -

KENNETH V. SHULSEN, Warden, Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's Brief in Opposition to the Petition contains substantial distortions regarding the record and the issues presented to the lower courts, necessitating this Reply.

I. ALL THE ISSUES RAISED IN THIS PETITION WERE RAISED IN THE STATE COURTS AND THE FEDERAL COURTS BELOW, AND NONE WERE REJECTED THERE ON THE BASIS OF PROCEDURAL DEFAULT.

Respondent argues at several points in its Brief in Opposition that several of the issues raised in this Petition are raised in this Court for the first time, or that those issues are procedurally barred due to a failure to raise them in state court. Those arguments are false and misrepresent the record in this case. Every legal issue raised in this Petition was raised and decided on the merits in both the state and federal courts,[1] as an examination of the record will show.

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[1]On most of these issues, even Respondent has not previously claimed any procedural default in the lower courts. The Court of Appeals below rejected Respondent's procedural default arguments on the few of the issues raised here on which Respondent made them. See Andrews v. Shulsen, 802 F.2d 1256, 1266 n.8, 1272 n.14 (10th Cir. 1986).

A. The Race Discrimination Claim (Petition, pages 4-14).

Petitioner's claim of race discrimination in his case was first raised in his initial state post-conviction Petition. A copy of that Petition is set out as Appendix B to Respondent's Brief in Opposition. Paragraph 11 of that Petition claimed that Petitioner's conviction violated the Federal Constitution, among other reasons, "because of the strong racial feelings that surrounded his trial ... and the receipt by the jury of a note urging them to 'Hang the Niggers'...." Amended State Habeas Corpus Petition at 3. Paragraph 12(b) of that Petition alleged a pattern of race discrimination in death sentencing in the state of Utah. Id. at 8-9. The Petition was dismissed without an evidentiary hearing the day after it was filed.

In affirming the dismissal, the Utah Supreme Court recognized and rejected on the merits Petitioner's "claim that the death sentence was imposed arbitrarily and as the result of racial discrimination." Andrews v. Morris, 607 P.2d 816, 825 (Utah 1980). The Utah court addressed the merits of this claim, and the others raised in the post-conviction Petition, "[n]otwithstanding the ... determination" the Petition did not show "why relief should be granted, including why the issues raised could not have been raised on appeal." Id. at 607 P.2d 821-822.[2]

Petitioner's federal habeas corpus Petition detailed the factual bases for his discrimination claim at length. A copy of the Amended Petition is included as Appendix C to the Respondent's Brief in Opposition. Paragraph 16 of that Petition alleged that there was a pattern of discrimination in the State

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[2]The Utah Supreme Court's alternative, nonspecific determination that some of the issues in the post-conviction Petition may have been procedurally defaulted was an alternative holding; and it was a holding in which only two of the five Utah Supreme Court Justices concurred. See 607 P.2d at 825 ff. The Court of Appeals thus determined there was no procedural bar to this claim. Andrews v. Shulsen, supra, 802 F.2d at 1266 n.8.

of Utah "against non-white defendants ... and persons who are accused of killing Caucasians", and that "Petitioner's sentences of death were imposed pursuant to this pattern and practice...." Id. at 19. The Petition then went on for three full pages to detail the facts supporting this claim. Id. at 20-23.

Contrary to Respondent's assertions here, the allegations in the federal habeas Petition included specific claims that most jurors were members of the Church of Jesus Christ of the Latter Day Saints "[i]n every capital case in the state of Utah," and that "under the doctrines of that church at the time of the defendant's trial, black people were not considered to be equal to white people." Id. at 21, ¶ 16(E). The Petition also included an allegation that "nonwhite jurors were excluded from the trial of this case by the use of prosecutorial peremptory challenges, by jury selection techniques which excluded from jury eligibility the majority of nonwhite individuals in Weber and Davis County, and the prosecutor's use of challenges to remove prospective black jurors." Id. at 22, ¶ 16(G).

Neither these, nor the other allegations underlying these claims were resolved below.[3] Despite Petitioner's requests that it be required to do so, Respondent never filed an answer which admitted or denied any of these factual allegations. See R. XII 8-9; R. 1386. The District Court first granted an evidentiary hearing on the claim, and then reversed itself and denied one, after permitting the parties to file briefs on "simply new law".

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[3]Respondent's successful efforts to get the District Court to dismiss these claims without developing them explain its misunderstanding of the bases for Petitioner's claims of discrimination in jury selection. See Brief in Opp. at 24-8. The record does not reflect whether, as Respondent implicitly claims, the jury rolls in Davis County were revised after the change in Utah statutory law in 1973. The record does reflect that the only black juror who was empaneled was dismissed by a prosecution peremptory challenge. The juror was James H. Gillespie, Jr., a state police officer who happened to be black. See St. Tr. 255. The state record clearly reflects that Mr. Gillespie was dismissed by the prosecutor's tenth peremptory challenge. St. R. 251.

R. XII:11. Petitioner's counsel was never called upon to proffer what additional evidence he would have presented at an evidentiary hearing. See Proffer, Certr Petition Appendix E at 2-3. But Petitioner's memoranda to the District Court made it clear his proof would include evidence specific to this case:

> The "specific factual instances" alleged in the Petition include ... the racially-prejudicial doctrines of the Church to which virtually all the decisionmakers in this case belonged (id. at ¶ 16 E); the influence of race on public opinion, and the direct communications of racial epithets to the jurors during the trial (id. at ¶ 15 F); the systematic removal of black jurors from the jury in this case (id. at ¶ 15 G) ... among other facts.

R. 1410 n.12.

The District Court's denial of any opportunity for Petitioner to establish these claims was challenged in similar terms in Petitioner's Brief to the Court of Appeals.

> The Petition included extensive allegations of acts of race prejudice in the state proceedings here, from the prosecutor's decision to seek William Andrews' death, to the removal of black people from the jury, to the receipt by the jury of the "Hang the Niggers" note, to the inconsistent positions taken by state prosecuting officials in this case, and those of white murder defendants. R. 1112-15. The allegations even set out the source of this racial prejudice: the doctrines of the Mormon Church, which held that black people were morally inferior. R. 1113.

App. Opp. Br. at 42, Andrews v. Shulsen, 10th Cir. No. 84-2781; see also id. at 39.

> It is difficult to imagine what greater influence race could have in a criminal case, than Petitioner alleged it had here: a racially charged public atmosphere surrounding the trial of these black men in a white community; the systematic removal of non-whites from the jury; prosecutors, jurors, and trial judge who were members of a religious group which held that black life and white life were not of equal worth; the receipt by the jury of a note saying "Hang the niggers." Petition, ¶ 16 E-I. Respondent has never disputed any of these facts.

App. Reply Brief 32.

It is difficult to conceive how an issue, resolved in the courts below on the face of the pleadings, could be better preserved for this Court's review.

B. The Lowenfield v. Phelps Issue (Petition, pages 22-25).

Like Petitioner's state and federal habeas corpus petitions, his certiorari petition here points out numerous aspects in which the statutory scheme under which his death sentence was imposed is inconsistent with the Eighth Amendment principles of Furman v. Georgia, 408 U.S. 238 (1972). Respondent falsely asserts that one aspect of this claim[4]--arising out of the fact that, like the Louisiana statute now before the Court in Lowenfield v. Phelps, No. 86-6867, the Utah sentencing system requires no findings of aggravation beyond the elements of first degree murder--was not previously raised in state or federal court. The record belies that claim.

On direct appeal, Petitioner argued that the Utah statutory scheme violated the Eighth Amendment principles of Furman, in briefs filed both before and after Gregg v. Georgia, 428 U.S. 153 (1976). The Utah Supreme Court rejected that claim on its merits. State v. Andrews, 574 P.2d 709, 710 (Utah 1978).

Petitioner's state post-conviction petitions both pled the unconstitutionality of the Utah statutory system under Furman, and detailed its defects. See State Post-Conviction Petition, ¶ 12(A), Resp. App. B 4-8. One of the details it specified was that in Petitioner's case, and all cases under this statute, "[a]ll factual findings needed to impose a sentence of death were made prior to consideration of the sentence to be imposed...." Id. at ¶ 12(A)(1)(a), Resp. App. B-4. Both the state District Court and the Utah Supreme Court on appeal recognized the post-conviction claim as essentially the same Eighth Amendment challenge that had been raised in Petitioner's direct appeal; see

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[4]Respondent's Brief in Opposition does not even discuss the other aspects of Petitioner's challenge to the Utah statute under Furman, which include Utah's failure to narrow the class of persons eligible for the death penalty, its lack of any requirement that the jury make written findings at sentencing, and its failure to require appellate review of death sentencing decisions. See Certiorari Petition, pages 25-26.

Andrews v. Morris, supra, 607 P.2d at 819 n.9, and rejected it on the merits.

In his habeas corpus petition filed in the federal court below, Petitioner again detailed the numerous defects in the Utah death penalty statute, in support of his claim under Furman. See Second Amended Petition, ¶ 14, Resp. App. C 12-17. Included in that specification was the following claim:

> Utah law gives sentencing authorities the unfettered discretion to choose which convicted murder defendants will be sentenced to death and which will be sentenced to terms of imprisonment. Any first degree murder case is eligible for a death sentence in the state of Utah. The sentencing decision is left wholly to the discretion of the jury, with no requirement of any additional findings to support a sentence of either death or life imprisonment whenever a defendant is found guilty of first degree murder.

Id. at ¶ 14(A), Resp. App. C 12-13 (emphasis added). Petitioner pressed this issue in his memoranda to the District Court:

> Though Utah law speaks of "aggravating circumstances", it defines them only as "includ[ing] those as outlined" as elements of first degree murder. Utah Code Ann. Sec. 76-3-207. This wholly different notion of "aggravating circumstances" requires nothing more in aggravation than the facts necessary to constitute the capital crime itself. Since these Utah "aggravating circumstances" are present in every case in which the defendant is eligible for a death sentence, they cannot serve to guide selection among death-eligible defendants, and provide no "'meaningful basis for distinguishing the ... cases in which [the death penalty] ... is imposed from ... the many cases in which it is not.'" Lockett v. Ohio, 438 U.S. 586, 601 (1978).

R. 392; see also R. 1138.

After the District Court upheld the statute, Petitioner argued this to the Court of Appeals, among other things:

> Utah aggravating circumstances do not 'genuinely narrow the class of persons eligible for the death penalty': They simply track the elements of first degree murder.[18]
>
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>
> [18]The Eighth Circuit has recently held this alone is enough to violate the Eighth Amendment.
>
> > '[S]tatutory aggravating circumstances play a constitutionally necessary function at this stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.'

> Zant, 103 S.Ct. at 2743. We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.

Collins v. Lockhart, 754 F.2d 258, 264 (11th Cir. [sic] 1985).

App. Op. Brief at 18, Andrews v. Shulsen, supra; see also id., App. Reply Brief at 12-13. The Court of Appeals rejected this and all aspects of Petitioner's Furman claim on its merits. See Andrews v. Shulsen, supra, 802 F.2d at 1261-2.

C. The Burden of Proof Issue (Petition, pages 27-30).

The claim that, at least under statutes like Utah's, the Federal Constitution requires a jury to be satisfied, beyond a reasonable doubt, of the appropriateness of a death sentence has been part of this case since its outset.

On his direct appeal to the Utah Supreme Court, Petitioner incorporated by reference his co-defendants' arguments "that the failure of the Utah [State] District Court to apply the standard of proof beyond a reasonable doubt violated the due process clauses of the Utah and United States Constitutions." State v. Pierre, 572 P.2d 1338, 1346 (Utah 1977). The Utah Supreme Court rejected this argument in Petitioner's case in light of its decision in Pierre. State v. Andrews, supra, 574 P.2d at 710.

After the Utah Supreme Court changed its position in State v. Wood, 648 P.2d 71 (Utah 1981), at the District Court's direction, Petitioner applied to the Utah Court for relief on this issue again. In denying that application, the Utah Court specifically rejected an argument by Respondent that Petitioner had waived this argument in his previous appeals; it held "that the doctrine of appellate waiver does not bar this action where Petitioner has raised the 'degree of certainty' issue on direct appeal and where the decision whose retroactive application they seek had not been decided before their cases became final. We therefore address the merits of their claim...." Andrews v.

Morris, supra, 607 P.2d at 88.

Petitioner carried this argument into federal court in his Amended Habeas Corpus Petition. That Petition alleged:

> Under Utah law no standards are provided whereby sentencing authorities are to balance the enumerated and unenumerated aggravating and mitigating factors in making a sentencing determination.... Later Utah Supreme Court decisions have changed that burden, but the rule of these cases was not applied by the Utah Supreme Court in this case.

Petition, ¶ 14(D), Resp. App. C 14. The Petition additionally alleged that the sentencing standard applied in this case "does not require proof beyond a reasonable doubt of the appropriateness of the death sentence and the weight of aggravating circumstances, and ... does not otherwise control sentencing discretion in capital cases," and that "absent a standard of proof beyond a reasonable doubt, the Utah death sentencing statute provides no significant check on arbitrariness and discrimination in the imposition of death sentences." Id. at ¶ 17, 17(G), Resp. App. C-23, 25.

Petitioner maintained this point in his Briefs to the Court of Appeals and the District Court below. In Petitioner's Brief to the District Court after Wood, he pointed out that case's requirement of

> an additional, special finding that the jury must unanimously make before imposing a death sentence: that the aggravating circumstances outweigh the mitigating circumstances, and the death sentence is appropriate, beyond a reasonable doubt. We believe the Constitution requires such a finding in all cases. See Ford v. Strickland, 696 F.2d 804, 877-883 (11th Cir. 1983), cert. denied ___ U.S. ___ (1984) (concurring opinion of Judges Anderson and Clark). But even if we are wrong on that, and such a finding is not required in all death penalty proceedings, under this unique statute, which lacks any other substantial controls on jury discretion, its absence makes a critical constitutional difference.

R. 1144. The District Court rejected this claim on its merits, holding:

> the federal Constitution does not mandate such a standard of proof at the selection stage of a capital proceeding, and that the Utah scheme adequately safeguards against the arbitrary imposition of the

death penalty without the underlying Wood standard. Andrews v. Shulsen, 600 F.Supp. 408, 427 (D. Utah 1984).

Petitioner challenged this in the Court of Appeals, again arguing that in the context of the Utah statute, certainty as to the appropriate punishment beyond a reasonable doubt standard is mandated by the Eighth Amendment.

> Woods' rule provided the first semblance of a clear standard for capital sentencing decisions under Utah's law. Although it remains an open question whether a similar standard is required in all capital sentencing schemes by the federal constitution, where there is no other control on jury discretion such a standard is more than a matter of state law. The Utah court was thus right in one respect: federal constitutional rules properly govern the retroactivity question here.

App. Op. Brief, Andrews v. Shulsen, supra, at 28 (footnote and citation omitted); see also id. at App. Rep. Br. 23-24. The Court of Appeals rejected this "direct challenge to the retroactivity analysis of Andrews III" on its merits. See Andrews v. Shulsen, supra, 802 F.2d at 1271.[5]

II. RESPONDENT MISREPRESENTS THE RECORD ON THE EVIDENCE AND FINDINGS REGARDING PETITIONER'S INDIVIDUAL INTENT.

Respondent's Brief in Opposition goes to great lengths to set forth the grisly details of Dale Pierre Selby's crime, for which he has paid with his life. In doing so, it distorts the record regarding and the state court findings on the crucial issue here, William Andrews' "individual culpability" under Enmund v. Florida, 458 U.S. 782 (1982).

Respondent's most significant misrepresentations of the evidence regarding this crime seek to diminish the significance of Petitioner's repeated protests of Selby's actions, and his ultimate withdrawal from the scene before any of the victims were killed. Orren Walker clearly testified that William Andrews "was

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[5]As the quoted language from the Court of Appeals indicates, the thrust of Petitioner's argument on this point was that the Utah Court's refusal to apply Woods' holding retroactively to Petitioner's case violated federal retroactivity principles applicable to decisions affecting the burdens of proof in criminal proceedings. The Court now has pending before it another case raising a similar issue. Yates v. Aiken, No. 86-6060.

disturbed during the whole evening," (St. Tr. 3176-7), and that he was heard to say "I can't do it; I'm scared", not just once, but twice. St. Tr. 3191, 3183. Mr. Walker testified that he first heard Mr. Andrews say this just before or after Selby gave the caustic liquid to each of the victims to drink. St. Tr. 3176-7. Mr. Walker heard Mr. Andrews say the same or similar words a second time, just before he left the scene. St. Tr. 3191, 3193. Nothing in the record suggests, and no court has found, that anyone but Selby had any involvement in the assaults and killings that took place after that time.

Respondent also mischaracterizes the instructions that were given to the jury on the intent with which it had to find Petitioner acted in order to convict. Those instructions went far beyond the Utah statutory definition of first degree murder, to which this Court referred in Enmund, and which Respondent suggests was followed here. Brief in Opp. at 46 n.62. Among the numerous instructions Petitioner's jury was given on this subject was an instruction that told the jury that a defendant is a "party to murder if ... he intentionally rendered active advice during the murder, or ... he intentionally helped the murderer escape from the immediate scene of the crime." Instr. No. 8, R. 352-3; see Resp. App. J. Consistent with this instruction, the prosecutor repeatedly argued to the jury that even "intentionally help[ing] the murderer escape," was sufficient for all purposes:

> [T]his would apply to any of the defendants that you find didn't actually do the killing himself, he would be a party, he instructs, if he intentionally helped plan or assisted in the advancement of the murder with intent that it would take place and did not effectively withdraw before the killing, if he intentionally rendered active advice during the murder, or if he intentionally helped the murderer escape from the immediate scene of the crime, then that person, those persons as parties are also under the law and under Judge Wahlquist's instructions is just as guilty or [sic] murder as the actor.

St.Tr. 3815 (opening argument) (emphasis added).

> Now you have got an instruction on parties and you have also got an instruction on withdrawal or principal. I want you to look at the principal instructions, numbers twelve and thirteen. That is a party, who intentionally helps plan or assist in the advancement of the murder with intent that it would take place and did not effectively withdraw before the killing. That he intentionally rendered active advice during the murder, he intentionally helped the murderers escape from the immediate scene of the crime. That is the party. It does not have to be the one that did it.

St.Tr. 4092-3 (rebuttal argument) (emphasis added). At least,

> [i]n combination with the instructions, the comments of the prosecutor may create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury.

California v. Brown, 93 L.Ed.2d 934, 943 (1987) (concurring opinion of Justice O'Connor).

Even in the later, narrower Instruction No. 12, the jury was told that it was enough to find this:

> If a person is a party to a robbery, or rape, or theft, etc., and he is also a party to the killing that may occur therein, only if he knew the killing was planned, or knew it was planned if certain events occur during the crime which does in fact occur, because he has approved conduct containing a contingent plan to kill, or if he knows certain co-parties plan to kill if certain contingencies occur. He would not be a party to such killing if he does not know of a plan to kill and only suspects such an event may possibly occur, but does not seriously expect it.

St.Tr. 357, Resp. App. J. Under this instruction, and the instructions on "withdrawal," the jury could have returned the verdict it did, even if it found William Andrews never participated or assisted in a plan to kill and that he withdrew his physical presence as soon as he learned of Selby's intentions. As soon as he had reason to "seriously expect" Selby would kill, under this instruction William Andrews was a "party" to the murders, however much he opposed them, "unless he effectively withdrew" by "giv[ing] timely warning to the police" or "completely destroy[ing] the effectiveness of his contribution to the commission of the crime." Instr. No. 13, R. 358. That is not the standard this Court approved in Tison v. Arizona, 107 S. Ct. 1676 (1987).

As Respondent's arguments make clear, only one Utah Supreme Court Justice purported at any time to find an "implied jury finding" that defendant personally intended to kill. See Resp. Br. 52, quoting Andrews v. Morris, supra, 607 P.2d at 826 (concurring opinion of Justice Stewart). The Court of Appeals' substitution of his judgment for the state court's was thus doubly flawed. It forgot the principle that

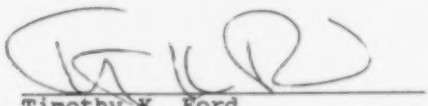
> Even if [a later instruction] ... is read as simply irreconcilable with [an earlier one, the court] ... cannot conclude that the jury followed the second instruction. '... A reviewing court has no way of knowing which of the two irreconcilable instructions the jury applied in reaching their verdict.'

Cabana v. Bullock, 106 S.Ct. 689, 695 n.2 (1986), quoting Francis v. Franklin, 105 S.Ct. 1965, 1975 (1985). And it contravened the holding Tison that such determinations should be made, in the first instance, in state court. Petitioner maintains the case should be remanded so the Court of Appeals can consider it in light of Tison.

CONCLUSION

Petitioner prays that Respondent's false claims of procedural irregularity will not deter this Court from reviewing the substantial and important issues presented by this Petition, on which his life depends.

Respectfully submitted,



Timothy K. Ford
Attorney for Petitioner

November 23, 1987

SUPREME COURT OF THE UNITED STATES

WILLIAM ANDREWS *v.* KENNETH SHULSEN, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-5449. Decided February 29, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence. Even if I did not hold this view, I would grant the petition because petitioner William Andrews was convicted of murder and sentenced to death under circumstances raising grave concerns of impermissible racial bias. These circumstances include a mid-trial incident in which a juror handed the bailiff a napkin with a drawing of a man on a gallows above the inscription, "Hang the Niggers." The district court in this case refused even to undertake an evidentiary hearing to investigate petitioner's substantial allegations of racial prejudice. The Constitution cannot countenance such indifference and summary treatment when a person's life is at stake.

I

Petitioner was convicted for his role in a multiple murder during the robbery of a Hi-Fi shop in Ogden, Utah. The ringleader of the crimes, Dale Pierre, was executed last year. Evidence at trial indicated that petitioner had a substantially less active role in the murders than Pierre. The two men entered the shop together and forced five people into the

store's basement. There the victims were forced to drink liquid drain cleaner, which induced violent vomiting. One of the two victims who survived the robbery testified that petitioner said, "I can't do it, I'm scared", and that petitioner left the scene shortly thereafter. Only after petitioner left did Pierre carry out, in particularly gruesome fashion, the multiple murders for which petitioner has been sentenced to die. Pet. for Cert. 3.

The murders understandably attracted substantial attention in the local press and the community from which the jury venire was drawn. The incident also may have generated racist sentiments, inasmuch as the defendants were black people and the victims were white members of the local community. The single black member of the venire was excluded, and an all-white jury was impaneled.

An ugly racial incident involving the jury occurred during the trial. The jury was eating lunch in a separate dining room when a juror presented the bailiff with a drawing that had been made on a napkin. The drawing represented a stick figure hanging on a gallows. Underneath the figure were the words, "Hang the Niggers." The bailiff was unable to say who had made the drawing or how many other jurors had seen it, although he did inform the court that "some of the jurors" had asked him "what the court may do about this." The only action the trial court took in response was to issue a general instruction to the jury to "ignore communications from foolish people." Pet. for Cert. 9–10 and n. 4.

After petitioner and Pierre were convicted, the court ordered a five-day recess. The jury was not sequestered. During this time, media coverage of the conviction was widespread and, petitioner alleges, racially inflammatory. Petitioner alleges, for example, that one newspaper ran a false report that petitioner had directed a "Black power" closed-fist gesture at one of the surviving victims after the verdict was read. Pet. for Cert. 10. The jury returned for the sep-

arate sentencing hearing and voted unanimously to sentence petitioner to death.

In his petition for a writ of habeas corpus, petitioner alleged that adverse publicity and hostile community sentiment had injected racial animus into his trial and undermined his right to a fair trial. The District Court refused to convene an evidentiary hearing to consider this claim. *Andrews* v. *Shulsen*, 600 F. Supp. 408, 415–416 (D. Utah 1984). The Court of Appeals for the Tenth Circuit upheld this refusal with little discussion, stating, "Having reviewed the briefs and the appellate record, we conclude that no hearing is required under the principles of *Townsend* v. *Sain*, 372 U. S. 293 (1963), and that the constitutional standard for a fair trial has been met." 802 F. 2d 1256, 1260 (1986).

II

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith* v. *Phillips*, 455 U. S. 209, 215 (1982). Such a hearing is, of course, especially vital when the defendant has been condemned to die. In *Turner* v. *Murray*, 476 U. S. 28 (1986), the Court vacated a death sentence entered in a case in which the trial court had refused the defendant's request to question the prospective jurors on racial prejudice. The Court recognized that "in light of the complete finality of the death sentence," the Constitution requires district courts to be especially solicitous of allegations of racial prejudice in capital cases. *Id.*, at —— [1688]. The Court therefore vacated the sentence, even though no specific allegations of racial prejudice had been made other than the fact that the case involved a black defendant and a white victim. The Court concluded that "the risk that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized." *Id.*, at —— [1688].

This case involves far more serious and specific allegations of racial animus than did *Turner*, including a vulgar incident of lynch-mob racism reminiscent of Reconstruction days. Moreover, petitioner is not asking this Court to decide whether there is sufficient evidence of racial prejudice to impeach the conviction and sentence. He seeks only to have the District Court undertake an evidentiary hearing to consider his charges. I would think it clear that the Constitution, not to mention common decency, requires no less than this modest procedure. See *Tanner* v. *United States*, 483 U. S. ——, —— [107 S.Ct 2739, 2755] (MARSHALL, J., concurring in part and dissenting in part).

III

Was it one (or more) of petitioner's jurors who drew a black man hanging on a gallows and attached the inscription, "Hang the Niggers"? How many other jurors saw the incendiary drawing before it was turned over to the bailiff? Might it have had any effect on the deliberations? Was the jury's decision to sentence petitioner to die influenced by racially-charged media coverage of the trial between the guilt and penalty phases? These are among the questions that petitioner deserves to have at least considered before he is put to death for a series of murders in which he played only a secondary role. It is conscience-shocking that all three levels of the federal judiciary are willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing. Not only is this less process than due; it is no process at all. I dissent.